TABLE OF CONTENTS

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Level 3 Communications, L.L.C.	:	
	:	
Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Illinois Bell Telephone Company (SBC Illinois).	:	**04-0428**

ADMINISTRATIVE LAW JUDGE'S PROPOSED ARBITRATION DECISION

By the Commission:

I. PROCEDURAL BACKGROUND

This proceeding was initiated by a Petition for Arbitration ("Petition") filed with this Commission on June 8, 2004 by Level 3 Communications, LLC ("Level 3"), pursuant to subsection 252(b) of the federal Telecommunications Act of 1996 ("Federal Act")[1] and 83 Ill.Adm.Code 761, to resolve certain open issues in order to enter into an interconnection agreement (the "ICA") with Illinois Bell Telephone Company d/b/a SBC Illinois ("SBC"). SBC is an incumbent local exchange carrier ("ILEC") in certain geographic areas of Illinois. Level 3 is a competitive local exchange carrier ("CLEC") providing telecommunications services in, *inter alia*, areas in which SBC also provides local services. The parties are presently operating under an ICA approved by this Commission. The ICA that results from this arbitration will replace that agreement.

SBC filed its Response to Level 3's Petition on July 6, 2004. On August 18, 2004, the arbitrating parties filed a Joint Revised Disputed Point List ("DPL") and Joint Proposed ICA. On August 20, 2004, they jointly filed an Agreed Appendix NICS, which removed an issue from contention. They filed a supplemental DPL (and ICA) on August 30, 2004. Also on that date, the parties filed revisions to certain disputed issues, as requested by the Administrative Law Judge ("ALJ").

The ALJ conducted a pre-trial hearing on June 17, 2004 in Chicago, Illinois. Evidentiary hearings were conducted on October 18, 2004. Level 3 presented the testimony of Susan A. Bilderback, Timothy J. Gates, William P. Hunt, III, Victoria R. Mandell, and Kenneth L. Wilson. SBC presented testimony by J. Scott McPhee,

[1] 47 U.S.C. § 252(b).

Michael D. Kirksey, Deborah Fuentes Niziolek, David J. Egan, Carl C. Albright, Roman A. Smith, Michael D. Silver, Chris Read, Mark Novack, Sandra Douglas, and Carol Chapman. Staff presented the testimony of James Zolnierek and A. Olusanjo Omoniyi. The case was marked "heard and taken" on December 16, 2004.

An Initial Brief ("Init. Br.") and Reply Brief ("Reply Br.") were each filed by Level 3, SBC and Staff. An ALJ's Proposed Arbitration Decision was served on all parties.

II. JURISDICTION

Subsection 252 of the Federal Act provides that within a specified time period "after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues." Both Level 3's Petition and SBC's Response assert that there are open issues between the parties. There is no dispute that the Petition was timely filed. Consequently, the Commission has jurisdiction to arbitrate the issues presented.

Section 252 of the Federal Act proscribes certain procedures, standards and outcomes for arbitrations conducted under that section. In addition, the Commission has adopted rules and procedures for such arbitrations in 83 Ill.Adm.Code 761. The foregoing federal and state provisions apply to this proceeding.

III. ISSUES FOR RESOLUTION

A. General Terms & Conditions ("GT&C")

1. GTC-1 Should the assurance of payment requirements be state-specific or state-interdependent?

a) Parties' Positions and Proposals[2]

(1) Level 3

Any requirement related to the Parties providing an assurance of payment should be based on a state specific criteria directly related to the payment history for the specific state in which the assurance is sought.[3] In contrast, under SBC's terms, in the improbable event Level 3 purportedly fails to pay a bill in a timely manner, even if that

[2] Each party summarized its own positions and proposals, at the direction of the ALJ. Those summaries appear in this Order as drafted by the parties, without any substantive change by the Commission or the ALJ. Minor editorial revisions were made by the ALJ for the sole purpose of standardizing the legal citations, abbreviations and format used throughout this Order. Under no circumstance should anything in the "Parties' Positions and Proposals" sections of this Order be presented or construed as an assertion, finding or conclusion of the Commission.

[3] Mandell Direct, p. 6.

bill is for services rendered in a different state, SBC could require deposits in *every* state in which the Parties do business.

SBC should be permitted to limit its financial exposure, but Level 3 disagrees with SBC's method of accomplishing this goal. Level 3 believes that its position – that assurances of payment be based upon state specific eligibility – fully allows SBC to protect itself from CLECs that do not pay, and in no way impairs that objective. Level 3's provisions protect against SBC's ability to take a problem that may arise in one state and hold it over Level 3 like a club in every state in which the Parties interact. While SBC's operations are region-wide, operations of the Parties in each state are governed by the specific guidelines, rules and regulations in place in that state. The Parties' operations in each state are unique and an arbitrary and unnecessary interdependence should not be created based on SBC's recommendation. SBC's approach creates an unfounded inter-dependence between state operations.

Importantly, Level 3's proposal does not remove SBC's ability to seek an assurance of payment. Rather, Level 3's language takes a common sense approach that links such assurances with the failure to pay for services rendered in that specific state. Also, there are many reasons why a particular bill may be unpaid, including disputes that involve particular state law issues. If Level 3 disputes that bill for a state-specific reason, SBC should have no claim to disconnect customers in other states for failing to provide SBC with some assurance of payment.

In addition, the FCC's deliberations on this issue support Level 3's position. In its Verizon Policy Statement,[4] the FCC determined that deposit policies similar to those proposed herein by SBC are overly broad, "imposing undue burdens on access customers . . . ."[5] Even acknowledging the impact of telecommunications industry bankruptcies, the FCC nonetheless concluded that concerns over an increased risk of nonpayment did not outweigh the potential harm to carrier customers. The same is true of the issue facing this Commission – the rationale for SBC's language does not outweigh the potential harm to the customers. For these reasons, the Commission should maintain state specific assurance of payment criteria and adopt Level 3's proposed changes in GTC Appendix Section 7.2, 7.2.1, 7.2.3, 7.3.2.

(2) SBC

To minimize the losses it incurs when CLECs do not pay their bills, SBC seeks to require each CLEC that has not demonstrated that it is a sound credit risk to provide an assurance of payment – i.e., a deposit – so that SBC will know there is money on hand to cover outstanding billed amounts in the event the CLEC becomes unable to pay or

[4] Verizon Petition for Emergency Declaratory and Other Relief, Policy Statement, WC Docket No. 02-202, FCC 02-337 (rel. December 23, 2002) ("Verizon Policy Statement").

[5] Id. at ¶ 6.

otherwise fails to pay its undisputed bills. Level 3 has agreed to provide a deposit for that purpose, but the parties disagree about some of the particulars.

The question presented by Issue GT&C 1 is whether the assurance of payment requirements should be state-specific or state-interdependent. Throughout section 7.2, which sets forth the circumstances under which SBC can request a deposit from Level 3, Level 3 proposes to add phrases like "in that State" and "for that individual State," so that SBC would be permitted to request a deposit from Level 3 only in the individual state or states where the circumstances pertained.

Level 3's proposal to immunize itself in most of SBC's service territory from the consequences of its conduct in one or two states is unreasonable. If a customer bounces a check at a Sears in Ohio, would the customer expect Sears to be wary of that customer only in Ohio? Of course not. If the customer's behavior in Ohio shows the customer is a bad credit risk, he is just as bad a credit risk in Illinois. Accordingly, it is appropriate for SBC to request assurance of payment of the CLEC as a customer, and not on a state-specific basis, when the CLEC's credit worthiness is deficient.

Furthermore, Level 3 is overlooking a benefit that SBC's language gives Level 3, and is ignoring a corresponding burden that Level 3's own language would impose on Level 3. Just as credit-impairment is not state-specific, neither is being a non-credit-impaired customer. And under section 7.2.1, which provides that the CLEC need not make a deposit if the CLEC has established a good credit history with SBC, a customer that establishes good credit with SBC in one state is – under SBC's approach – excused from making a deposit in all states.

SBC's proposed language in section 7.2 appropriately balances SBC's need to protect itself against the risk of non-payment – the risk that has cost SBC approximately $200 million in the last three years – and CLECs' understandable desire to not pay a deposit if no deposit is needed.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

While SBC (or any carrier that provides services before receiving payment) should be permitted to take appropriate measures to assure payment (or compensation for non-payment), not all such measures reflect sound policy. Under SBC's proposal, conditions outside of Illinois could impel SBC to require assurance of payment in Illinois, even if Level 3 had fulfilled all requirements of the parties' Illinois ICA, including timely payment to SBC for all services obtained in Illinois. Taken at face value, and without regard for the potential for anti-competitive abuse that Level 3 perceives, SBC's proposal essentially presumes that smoke indicates fire. Thus, if Level 3 were to fail to make timely payment of a Nevada bill, SBC could construe that as a warning about Level 3's general credit worthiness and take protective action in Illinois.

The Commission does not agree that SBC needs the power to take such action based on out-of-state conditions, because it will have the same power to act in response to *in-state* conditions. That is, if Level 3 is meeting its obligations in Illinois, SBC does not need to take action here, but if Level 3 is delinquent in Illinois, SBC will have authority to act under the Illinois ICA. Otherwise, SBC would be able to demand assurance in Illinois, based on non-Illinois circumstances, when it could not do so under the terms of the Illinois ICA based on Illinois circumstances. Indeed, if SBC obtains the same permission to act on out-of-state events in all the states in which it is interconnected with Level 3, then circumstances in any one state would effectively trump the ICA provisions in every other state, even if Level 3 were meeting its obligations in those states. Accordingly, we reject a provision by which Level 3 can lose the benefits of complying with the agreement we will approve in Illinois, due to out-of-state conditions.

2. GTC-2 (Level 3) Should the ICA recognize that assurance of payment cannot be demanded on Level 3 if Level 3 has shown a positive payment history in a particular state?

(SBC) Should SBC Illinois be denied the right to request assurance of payment if Level 3 withholds payment of undisputed amounts on up to two occasions within a 12-month period?

a) Parties' Positions and Proposals

(1) Level 3

Level 3 maintains that the Agreement should provide it with appropriate protections against possible SBC unilateral demands for assurance of payments with little or no business justification.[6] Level 3 proposes that SBC may only seek an assurance of payment if Level 3 has received more than two valid past due notices for undisputed amounts billed by SBC within the prior twelve months on in that specific state. This proposal requires SBC to take into account Level 3's positive past payment history. However, if Level 3 is unable to maintain a positive past history of payment, then SBC can justifiably seek an assurance of payment.

SBC relies heavily on the theory that services are being provided "on credit," as if the industry norm that payment for services occurs after rendering somehow justifies extraordinary allowances on SBC's behalf. All carriers receive payment after services are provided, and all carriers face risks and rewards similar to those faced by SBC – including Level 3. SBC states that at least twelve (12) consecutive months of timely payments demonstrates "an ability and a willingness to pay throughout the entire

[6] Mandell Direct, p. 8.

business cycle."[7] While this may be true, Level 3's language provides the same assurances, while permitting carriers that have not yet established a year-long business relationship with SBC to not begin the relationship at a disadvantage by having to provide assurances of payment when no indication exists that the carrier is not a financially stable entity.

The FCC has made policy statements that support Level 3's position on Issue No. GTC-2. The FCC recommended in its Verizon Policy Statement that interstate access tariffs should be revised "to define the proven history of late payment trigger for requiring a deposit to include a failure to pay the undisputed amount of a monthly bill *in any two of the most recent twelve months*, provided that both the past due period and the amount of the past due delinquent payment are more than *de minimis*."[8]

In the Verizon Policy Statement the FCC was addressing a deposit requirement with respect to interstate access charges, though the principles are equally applicable here. If the CLEC is able to demonstrate a positive payment history in a particular state, then a deposit is not appropriate. The FCC chose to utilize the same bar Level 3 proposes to determine when deposits are appropriate - a demonstration that the CLEC has failed to pay undisputed sums in any two of the most recent twelve months. Further, the Commission must remember that Level 3 has proven its financial and technical abilities in order to be certified as a telecommunications carrier in this state. SBC should not be able to put itself in a position that is superior to that of the Commission by making independent determinations of financial liability.

An assurance of payment reduces Level 3's flexibility to use its capital for its own business purposes and it has a negative impact on the Level 3 balance sheet. Level 3 sees its proposal as not only supporting the FCC's policy statements, but a reasonable compromise to alleviate SBC's concerns. Level 3's language places a reasonable restriction on SBC's ability to seek an assurance of payment and balances the interests of both Parties and Level 3's customers. For the reasons outlined above, the Commission should adopt Level 3's proposed changes to Sections 7.2 and 7.2.1.

(2) SBC

Agreed language in GT&C section 7.2.1 allows SBC to request an assurance of payment if Level 3 "has not already established satisfactory credit by having made at least twelve (12) consecutive months of timely payments to" SBC. Level 3 proposes to add to the end of section 7.2.1 the words, "(with no more than two (2) valid past due notices for undisputed amounts within that twelve (month) period)."

Level 3's counter-proposal is unreasonable, and not in harmony with sound business practice. A customer that can be counted on to pay its bills to the point that it

[7] Egan Direct, p. 12.

[8] Verizon Policy Statement at ¶ 26.

should be permitted to buy substantial amounts of products and services on credit without making a deposit simply does not get two late payment notices a year.

Level 3 contends that its proposal "merely requires SBC to take into account Level 3's positive past payment history." But that is not an accurate depiction of the competing contract language proposals. SBC's version of section 7.2.1 takes fully into account Level 3's positive past payment history by excusing Level 3 from making a deposit if it in fact has a positive payment history. Level 3's proposal attempts to water down the meaning of "positive payment history" by redefining it to include a history where Level 3 has received two past due notices. That is not appropriately regarded as a positive payment history.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

SBC maintains that a single past due notice indicates lack of credit worthiness and should trigger SBC's ability to request a deposit. Level 3 contends that only a third such notice should permit SBC to take action. The Commission finds that SBC's position is too stringent, because an isolated tardy payment can elicit a deposit demand or, at the least, restart the "good credit" calendar for Level 3. Level 3's proposal, on the other hand, is too lenient. It would allow Level 3 to go three consecutive months without payment before authorizing SBC to require assurance. The Commission will approve a middle position, allowing Level 3 one past due notice without impairing its "satisfactory credit" under Section 7.2.1. As SBC recognizes, SBC Rep. Br. at 4-5, this is consistent with the Verizon Policy Statement, relied upon, in turn, by Level 3.

3. GTC-3 How should the ICA describe Level 3's financial impairment that will trigger a request for assurance of payment?

a) Parties' Positions and Proposals

(1) Level 3

As stated with regard to Issue No. GTC-2, Level 3 maintains that the Agreement should provide it with appropriate protections against possible SBC unilateral and unwarranted demands for assurance of payments. As such, Level 3 proposes that any financial impairment for which assurances of payment might be demanded should be based upon "significant and material" impairment such that any minor change to Level 3's "established credit, financial health, or credit worthiness" would not subject Level 3 to immediate demands for assurances of payment by SBC.

SBC alleges that the phrase "significant and material impairment" creates unnecessary confusion and an "obvious invitation to disputes."[9] Level 3 disagrees and asserts that just the opposite result would occur. Level 3's language provides clarity and a precise understanding of the level of impairment that will be deemed weighty enough to justify the imposition of assurances of payment. It is the lack of such clarity as SBC proposes that would lead to confusion and an "obvious invitation to disputes."

In support of its position, Level 3 refers to the Verizon Policy Statement, where the FCC held that "[b]road, subjective triggers that permit the incumbent LEC considerable discretion in making demands, such as a decrease in 'credit worthiness' or 'commercial worthiness' falling below an 'acceptable level' are particularly susceptible to discriminatory application."[10] Level 3 drafted the proposed language to encapsulate the FCC's position. As such, Level 3 proposed that in order to demand assurance of payment, SBC must meet the minimal threshold showing that Level 3's financial status has "significant and material" impairment. Without such a threshold safeguard, the Agreement will not protect Level 3 from unilateral and improper demands for assurance of payment, contrary to the FCC's announcements in the Verizon Policy Statement.

In addition, SBC contends that the baseline for determining impairment should be set at August 1, 2004. Level 3 disagrees and states that it should be the Effective Date of the Agreement. Prior to the Effective Date, the Parties have no obligation to each other under the Agreement. It is only after the agreement takes effect that any changes in Level 3's credit worthiness is of import to SBC and should be considered for purposes of protecting SBC's revenue. On this basis, Level 3 asks that the Commission adopt Level 3's proposed changes to Sections 7.2 and 7.2.2.

(2) SBC

Agreed language in section 7.2.2 allows SBC to request a deposit from Level 3 if there is an "impairment of the established credit, financial health or credit worthiness of Level 3." The provision goes on to say that, "Such impairment will be determined from information available from financial sources, including but not limited to Moody's, Standard and Poor's and the Wall Street Journal," and it then describes the particular types of financial information that can be considered. Thus, the parties have agreed that SBC may request a deposit from Level 3 if Level 3's credit is impaired, as indicated by specified types of financial information reported in reliable financial sources. The parties have two disagreements, however.

First, Level 3 proposes to add language that would require the impairment to Level 3's credit, financial health, or credit-worthiness to be "significant and material" in order for SBC to be entitled to request a deposit. That language should be rejected, because it is an invitation to disputes. It is unclear what "significant and material"

[9] Egan Direct, p. 15.

[10] Verizon Policy Statement, ¶ 21.

means, or how the parties (or the Commission, if the matter were brought here) would measure whether an impairment to Level 3's credit is "significant and material." The whole purpose of the deposit requirement is to get funds on deposit before a financially shaky CLEC runs up large bills that may never get paid, and Level 3's proposed right to contest any request for a deposit under section 7.2.2 on grounds of materiality or significance – and thus to delay the posting of any deposit – would defeat that purpose.

The parties' second disagreement concerning section 7.2.2 begins with language in section 7.2.2 that provides that SBC may request a deposit if "at any time on or after the Effective Date" there has been impairment in Level 3's credit, financial health, or credit-worthiness. This gives rise to the obvious question: impairment as compared to when? Level 3 proposes that the baseline date be the Effective Date of the interconnection agreement, so that a deposit could be requested only if Level 3 suffered an impairment of credit after the Effective Date. SBC, on the other hand, proposes that the baseline date be August 1, 2004 – which is a date that SBC states it chose because it was in the midst of the parties' most recent negotiations over this interconnection agreement and was approximately when SBC had its most recent opportunity to check on Level 3's credit.

Level 3's proposal is inconsistent with contract language to which Level 3 has already agreed. If Level 3's proposed date were adopted, section 7.2.2 would say that SBC could request an assurance of payment if "at any time *on or after* the Effective Date," Level 3's credit was impaired "as compared to its status on the Effective Date." Obviously, it is impossible for Level 3's status on *the Effective Date* to be impaired as compared to Level 3's status on the Effective Date. Thus, Level 3's proposal leads to an absurdity, and should be rejected.

Differently put, the first few words of section 7.2.2 clearly reveal an understanding that there can be an impairment not only *after* the Effective Date, but *on* the Effective Date as well. And the only way one can discern an impairment on the Effective Date is by looking back to a point in time *before* the Effective Date. And that is reasonable, because if Level 3's financial condition suffers an impairment between today and the Effective Date, SBC should be allowed to request a deposit.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

Neither party presents satisfactory language for resolution of this issue. SBC merely identifies (but does not limit) sources of financial or credit-related information, but says nothing about the standards, thresholds or weightings that will be applied to such information. The result is that complete discretion is accorded to SBC. Level 3 proposes language that is both better (because it addresses the magnitude of impairment) and worse (because it does not identify the information to be assessed to

determine impairment). As a consequence, the parties are virtually invited to dispute any deposit request.

Absent acceptable language from the parties, the Commission will only set guidelines for future drafting on this subject. We find it appropriate that the ICA contain terms that authorize a deposit demand in the event of credit impairment. However, such impairment must be more than *quantitatively* trivial and, to make that determination, the parties should identify the specific types of information that will be factored in, and the objective standard for identifying impairment[11].

With respect to the second issue under this heading, the Commission approves SBC's proposal to use August 1, 2004 as the base date for comparing Level 3's credit performance. While Level 3 is correct that it has no duties under the ICA until that document is approved, no additional duty is imposed on Level 3 here. We are merely identifying a date for comparison purposes, so that when Level 3's duties in the ICA *do* commence, a quantification can be made.

4. GTC-4 In order for a failure to timely pay a bill to trigger a valid request for assurance of payment, must SBC comply with the presentation of invoices and dispute resolution requirements of the ICA and to what extent?

a) Parties' Positions and Proposals

(1) Level 3

There should be no question that SBC must comply with the presentation of invoices and dispute resolution requirements of the Agreement. Level 3's desire to add clarification that adherence to these requirements – on both the part of Level 3 and SBC - influence the demand for assurances of payment in no way creates "vagueness" or "uncertainty," as stated by SBC,[12] but rather ensures that accountability is tied to requests for assurances of payment.

The Agreement must make clear that neither Party can unilaterally terminate service or demand assurance of payment without first following the prerequisite, applicable contractual and legal procedural requirements contained therein. Thus, Level 3 proposes the common-sense approach that prior to demanding an assurance of payment, SBC must provide Level 3 with notice of deficiency by adhering to the invoice and dispute resolution terms in the Agreement. Level 3 believes that if SBC is not clearly required to adhere to the invoice and dispute resolution terms of the Agreement prior to demanding an assurance of payment, then Level 3 will not receive sufficient

[11] Solely as an example, the parties could determine that a bond rating downgrade of a certain magnitude will constitute impairment.

[12] Egan Direct, p. 19-20.

notice, nor be given the opportunity to correct the problem.[13] As such, the Commission shall adopt Level 3's common-sense proposals in Section 7.2.3.

(2) SBC

There are two disagreements concerning section 7.2.3, and both arise out of Level 3 proposals to add to the language on which the parties have agreed. Agreed language in section 7.2.3 permits SBC to request a deposit if Level 3 fails to pay a bill, except to the extent the bill is "subject to a good faith, bona fide dispute" as to which Level 3 has "complied with all requirements set forth in Section 9.3," which prescribes the procedure for disputing a bill. Level 3 proposes two additions to the agreed language. First, Level 3 proposes to add the word "substantially" before "complied," so that Level 3 would only have to "substantially comply" with the requirements of section 9.3. Second, Level 3 proposes to add the following at the end of section 7.2.3: "provided that [SBC] has likewise substantially complied with all requirements of this Agreement with respect to presentation of invoices and dispute resolution" – so that SBC could not request a deposit from Level 3 after a Level 3 failure to pay a bill unless SBC has substantially complied with those requirements. SBC opposes both additions proposed by Level 3.

Level 3's proposal that it be required only to "substantially comply," rather than "comply" with the requirements of section 9.3 is unreasonable. Just as the parties are required to comply with all the other provisions of the ICA, so Level 3 should be required to comply with section 9.3, not just "substantially" comply with it. Level 3's proposal to insert "substantially" here would introduce an element of vagueness and uncertainty into the parties' dealings that would promote disputes later.

Level 3's second proposal is to add language that would allow SBC to request a deposit from Level 3 after Level 3 fails to pay a bill only if SBC complied with the requirements of the Agreement concerning presentation of invoices and dispute resolution. Level 3's proposal has a legitimate purpose, but its proposed language is far broader than it needs to be – so broad, in fact, that it must be rejected because it would undermine section 7.2.3. The concern that Level 3's language purports to address is that Level 3 does not want to be required to make a deposit in a situation where it has failed to pay a bill and has also failed to dispute the bill pursuant to the procedures in section 9.3 because of a failure on SBC's part to present the bill properly or to adhere to its own counterpart obligations under section 9.3. That is a legitimate concern, but the language Level 3 has proposed goes far beyond addressing that concern, because it would prohibit SBC from requesting a deposit from Level 3 if SBC did not comply – at any time, and not necessarily in connection with the episode at issue – "with all requirements of this Agreement with respect to presentation of invoices and dispute resolution." Under Level 3's language, in other words, if SBC ever, at any time, failed to substantially comply with one of those requirements, SBC could never request a deposit

[13] Mandell Direct, p. 12.

from Level 3 based on a Level 3 failure to pay a bill, even if there were no connection between SBC's failure and Level 3's failure. That makes no sense, SBC asserts, and would, if SBC ever slipped up with respect to the presentment of an invoice, eliminate SBC's rights under section 7.2.3. Accordingly, Level 3's proposal should be rejected.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

The Commission agrees with SBC that Level 3's recommendation is too broad, insofar as it carries the potential to encompass events unrelated to SBC's specific ground for demanding assurance. We also agree with SBC that this dispute could have been obviated had Level 3 accepted SBC's suggestion that no deposit could be required "if Level 3's failure to pay a bill or dispute the bill was *caused by* or *resulted from* a failure by SBC to comply with its obligations with respect to invoicing or dispute resolution." SBC Init. Br. at 37 (emphasis in original). Language to that effect should be incorporated into Section 7.2.3.

We reject Level 3's proposal to treat "substantial" compliance as adequate compliance. If substantial compliance were enough, then whatever constitutes substantial compliance might as well be complete compliance. The far better course is to adopt rational and constructive requirements with which reasonable carriers can comply. Then, such requirements should be fully complied with, and some undefined lesser conduct should not suffice. Indeed, suggesting that it will suffice is an invitation to dispute.

5. GTC-5 Should Level 3 be permitted to dispute the reasonableness of an SBC request for assurance of payment?

a) Parties' Positions and Proposals

(1) Level 3

Level 3's position is consistent in that its seeks to protect against SBC's potential to unilaterally impose an assurance of payment with little or no justification. Issue GTC 5 is a perfect example of such a possibility. As a matter of fundamental fairness, if the Agreement is going to contain terms and conditions upon which SBC can demand Level 3 make assurance of payments, then the Agreement must also allow Level 3 to have the parallel opportunity to dispute the reasonableness of that demand.[14] Level 3 proposes language that would give it such an opportunity to dispute the reasonableness of the demand for an assurance of payment, but specifically limits when Level 3 can make such a dispute to those instances in which it has a good-faith and bona fide basis

[14] Mandell Direct, p. 14.

to dispute.[15] Thus, under Level 3's language, SBC is still able to make an assurance of payment demand, but Level 3 would have the ability to protect itself from unfounded demands when it has a good-faith and bona fide basis for doing so.

In addition, SBC contends that its language is in Level 3's favor because it prevents SBC from immediately terminating service, rather providing Level 3 with ten (10) days to respond to the demand for assurances of payment.[16] Although SBC cannot "imagine why Level 3 would oppose SBC language,"[17] it is not clear from its language exactly what its intent may be. Indeed, if SBC's language does as it contends, then the Parties' language serves the same purpose and will achieve the same goal. However, Level 3's proposition is more clearly articulated and more rationally imposes protections for both Parties. For these reasons, Level 3 asks that the Commission uphold such a basic threshold by adopting Level 3's language in Sections 7.8 and 7.8.1.

(2) SBC

Level 3's proposed language in GT&C Section 7.8 would allow it to dispute an assurance of payment request based on a contention that the request was not "reasonable." On the surface, that might appear to be a reasonable proposal, but upon consideration, it is not. SBC can request an assurance of payment only if certain precise criteria – spelled out in detail in sections 7.2.1, 7.2.2, 7.2.3 and 7.2.4 – are met. If those criteria are met, SBC is permitted to request an assurance of payment. And if they are met, Level 3 cannot properly be permitted to dispute the request on the grounds that it is not "reasonable." By definition, if the criteria are met, the request is appropriate. To add on top of that a vague additional requirement that the request, in addition to meeting the specified criteria, must also pass an undefined "reasonableness" test would accomplish nothing except to allow Level 3 to dispute any request it chose. Level 3's proposal here makes no more sense, SBC states, than would a proposal that SBC's bills, in addition to being accurate and reflecting the prices called for by the contract, must also be "reasonable."

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

We concur with Level 3 that it ought to have the opportunity to dispute a deposit request by SBC. We also concur with SBC that the subject of the dispute should be whether the request is compliant with the ICA deposit provisions invoked by SBC in support of its request, not whether it is "reasonable." Level 3's reasonableness

[15] Mandell Direct, p. 14.

[16] Egan Direct, pp. 24-25.

[17] Egan Direct, p. 25.

requirement is too vague to function constructively in the parties' agreement. Therefore, so that Level 3's right to object to a deposit request is spelled out appropriately in the ICA, text should be added that preserves that right, with the proviso that Level 3's objection must be specifically aimed at the ICA provision(s) SBC relies upon for a deposit.

6. GTC-6 (Level 3) Should the ICA contain terms requiring SBC to comply with all disconnection requirements contained in the ICA and the applicable law prior to disconnecting any Level 3 customers?

(SBC) When the contractual conditions for terminating the provision of products and services under the ICA due to the nonpayment of bills are present, should the billing party be required to comply with not only all procedures set forth on the ICA but also with unspecified "applicable law" regarding discontinuance of service?

a) Parties' Positions and Proposals

(1) Level 3

Level 3 proposes language in GTC Appendix Section 8.8.1 that requires the billing party (either Level 3 or SBC) to comply with all of the procedures set forth in the Agreement "and otherwise set forth in applicable law." SBC contends that Level 3 should bring any pertinent applicable law to the Commission's attention now and include any such applicable law in the Agreement.[18] What SBC chooses to ignore is the reality that "applicable law", particularly as it relates to the telecommunications industry, is in a perpetual state of flux. As such, no agreement can fully incorporate or allow for the changes that may occur in the law at some point in the future, yet the Parties still remain responsible for reflecting those changes and adhering to them under Level 3's proposal. Level 3's language clarifies that both Parties must comply with all of the billing procedures laid out in the Agreement, as well as any other applicable law, as that term is defined in the Agreement.[19] This basic acknowledgment of the impact of applicable law on the billing obligations is routine and, as such, the Commission should adopt Level 3's proposal in Section 8.8.1.

(2) SBC

Section 8.8.1 provides, in agreed language, that if a billing dispute is resolved in favor of the billing party, the billed party's failure to pay the amounts determined to be owing within a specified time "shall be grounds for termination of the . . . products and

[18] Egan Direct, p. 27.

[19] Mandell Direct, p. 15.

services provided under this Agreement." There then follows agreed language that states: "provided, however, that the Billing Party shall comply then with all procedures set forth under this Section 8 regarding discontinuance of service and/or termination of this Agreement." GT&C Issue 6 concerns Level 3's proposal to add to that proviso the words "and otherwise set forth in applicable law." The proposed overlay of "applicable law" is unacceptable for the same reason as its proposed invocation of the same vague term elsewhere in the ICA. The purpose of the Agreement is to set forth in detail the parties' rights and obligations in light of current law. To the extent that there is any pertinent "applicable law," Level 3 should have brought that law to the Commission's attention in this proceeding, and should have advocated its express inclusion in the Agreement. Approval of Level 3's proposed language in its current form would be an invitation to disputes later about what is and what is not "applicable law."

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

The Commission agrees with SBC that the term "applicable law" is vague, likely to engender needless disputes and ill-suited to an ICA.[20] If "applicable law" is currently in effect, its requirements should be incorporated now into the ICA's original apportionment of rights and responsibilities, not alluded to generically and without an implementation scheme. If "applicable law" emerges after the ICA takes effect, it should (to the extent required by the relevant legislature, agency or court) be specifically and expressly incorporated through the mutual negotiation contemplated by the ICA's change-of-law provisions. Moreover, the term "applicable law" is superfluous. The carriers' conduct will be governed by applicable law in any case, whether or not that law is referenced generically, as Level 3 proposes, or incorporated into the ICA through change-of-law processes.

7. GTC-7 Should Level 3's failure to pay undisputed charges entitle SBC to discontinue providing all products and services under the ICA, or only the product(s) or service(s) for which Level 3 has failed to pay undisputed charges?

a) Parties' Positions and Proposals

(1) Level 3

SBC should not be permitted to disconnect all services utilized by Level 3 (in *any state* in which Level 3 may be providing service) in the unlikely event that Level 3 does not pay an undisputed, billed amount. Level 3 believes that permitting SBC to

[20] The Commission notes, however, that the term "applicable law" appears elsewhere in the agreed text of the ICA, without objection from SBC. *E.g.*, GTC Sec. 7.2.4; GTC Sec. 9.5.1.

disconnect any and all services or products purchased by Level 3 for an alleged failure to pay undisputed amounts for only a subset of those services is extreme. Instead, Level 3 proposes that SBC only be allowed to disconnect the specific service or products for which Level 3 has failed to pay the undisputed amount.

Level 3's language in Section 9.2 seeks to protect its customers from discontinuance of services that are not part of an unpaid bill. Level 3's customers should not have to suffer the loss of service in the event that charges are unpaid for unrelated services. In contrast, the result of SBC's proposal would be to leave Level 3 at risk of losing its customer base subject to SBC's over reaching.[21]

The interconnection arrangements between Level 3 and SBC are complex, and this Commission is aware of the complexity of billing disputes between ILECs and CLECs. There are numerous reasons why a particular bill may be unpaid, including disputes that involve particular network elements, particular rates assessed, collocation facilities, and/or interconnection arrangements. There may be a pending proceeding that would have an effect on Level 3's obligation to pay a bill for a particular unbundled network element that the Parties have not yet agreed on how to handle. If Level 3 fails to pay a bill for a particular service or network element, SBC should have no claim to disconnect any other of Level 3's services. All obligations relating to payment should be service-specific.

Furthermore, Level 3 needs at least thirty days in order to perform the necessary internal analysis and audit to respond to the unpaid charges notice. Thirty days will allow the Parties to internally perform a more thorough investigation of the problem, work together informally, and help avoid unnecessary formal actions and/or litigation. Level 3's language in Section 9.2 is beneficial to the Parties, as well as this Commission, and should work to avoid unnecessary disputes. As such, Level 3 asks that the Commission adopt Level 3's language in GTC Appendix Section 9.2.

(2) SBC

The disputed language in section 9.2, embodies three disagreements, only one of which is identified in the statement of the issue set forth above. The other two are (i) whether the provision should say that a failure to pay undisputed charges "shall" be grounds for disconnection or "may" be grounds for disconnection; and (ii) whether Unpaid Charges (as defined) must be paid within 30 calendar days or ten business days following receipt of a notice of unpaid charges.

"May" vs. "shall." Section 9.2 should say that a failure to pay undisputed bills "shall be" grounds for disconnection, not that it "may be" grounds for disconnection. The use of "may" would make no sense, because it raises the unanswered question, "Depending on what?" The only intent of section 9.2 that makes sense is that a failure to pay is grounds for disconnection. That does not mean that disconnection is

[21] Mandell Direct, p. 16.

automatic if Level 3 failed to pay undisputed charges, but only that under this Agreement nonpayment is in fact grounds for disconnection under the circumstances described.

Discontinuation of all services, rather than only unpaid services. There are two reasons for allowing SBC to terminate all services to Level 3 if Level 3 fails to pay its undisputed bills: First, the simple fact of the matter is that if Level 3 is failing to pay its undisputed bills, it is failing to pay its undisputed bills. The reason for the termination of service is that if a customer is failing to pay without any valid excuse, the risk that that customer will continue to fail to pay is very high, so it would be commercially irrational for the seller, SBC in this case, to continue to provide services. It makes no difference what services the customer fails to pay for. (If a customer of Sears failed to pay for a couch, one would not expect Sears to discontinue selling furniture to that customer but to continue to sell him automotive products.)

Second, Level 3's proposal is unworkable, because it would limit treatment options to individual services (presumably individual Billing Account Numbers). This scheme is administratively burdensome and would also invite potential mischief on the part of Level 3, which could transfer services between different services in order to avoid disconnection. For example, resale end users could be converted to UNE lines, which would cause the same services to be billed under different accounts.

30 calendar days vs. ten business days. The period of time in question is the period within which a Non-Paying Party must remit all undisputed Unpaid Charges to the Billing Party following receipt of the Billing Party's notice of Unpaid Charges - thirty Calendar Days (Level 3's proposal) or ten Business Days (SBC's proposal).

In the situation at issue here, Level 3 initially had 30 days to pay its bill; failed to pay or dispute the bill; and SBC at some point thereafter is sending Level 3 a notice that it must pay the undisputed charges within a stated period or be at risk of a termination of service. In that scenario, ten business days – two full weeks – is ample time for Level 3 to make its already late payment. This is not to say, of course, that SBC will actually terminate service ten business days after sending the notice if Level 3 fails to pay, but SBC should have the contractual right to do so.

Level 3 asserts that it needs "at least thirty days to perform the necessary internal analysis and audit to respond to the unpaid charges notice." SBC disagrees. Level 3 already had thirty days (or more) to analyze the bill when it received it, and Level 3 determined it had no disagreement with the bill – that is why it did not dispute it. (Recall that what we are talking about here is a failure to pay undisputed charges.) Now, SBC is informing Level 3 that it needs to pay the bill that Level 3 has already analyzed and decided not to dispute. Level 3 does not need more than ten business days to pay an undisputed bill.

The Commission should resolve all three aspects of GT&C Issue 7 in favor of SBC.

(3) Staff

GT&C Issues 6 and 7 address the issue of disconnection of services for nonpayment of undisputed charges between the parties. The Staff recommends that the Commission accept SBC's position, modified to accommodate certain concerns of Level 3 regarding the services that could be disconnected in an instance when Level 3 either fails or refuses to pay an undisputed amount. Staff Ex. 2.0 (Omoniyi), at 11. The Staff further recommends SBC should have the right to disconnect service, but with some well-defined guidelines for such a bill collection processes. Id., at 11-12. The Staff recommends that the collection process should include at least the following two steps:

1. SBC should provide Level 3 adequate notice in writing regarding the bill in question by forwarding the bill to an appropriate official designated by Level 3. Currently, SBC proposed sending two notices of disconnection for undisputed and unpaid charges but without specifying when it would be done. SBC should clarify how those notices would be sent to Level 3 and the applicable time interval for each notice.

2. SBC's notice to Level 3 should contain a specific deadline for disconnection of service to Level 3 if payment, in a specified amount, is not forthcoming, and should identify the service(s) that SBC will disconnect. Id.; Staff Init. Br. at 4-5.

The Staff recommends creating a disconnection process that is a blend of the parties' positions, for the following reasons. Staff Ex. 2.0 (Omoniyi), at 12. First, SBC's concern that Level 3 should either dispute a bill or pay it is a reasonable request. Id. There is nothing unusual about such a position and it is a common commercial practice that payment would be made for services, unless the paying party disputes the bill. Second, SBC indicated that there would be no disconnection of service in the event that a bill is disputed. Id., at 12-13. A third reason is Level 3's concern that SBC may simply disconnect any or all service to Level 3's end users. Id., at 13. SBC's proposal ultimately seems to grant SBC the unilateral authority to decide which services of Level 3 that could be subject to disconnection in the event of nonpayment. The Staff recommends that SBC should not be allowed to disconnect any and all services; in particular, SBC should not disconnect those services paid for by Level 3. A result contrary to this recommendation is likely to engender confusion between the parties and also severely affect Level 3 end-users (or end users of those carriers to which Level 3 might sell services), who have nothing to do with the bill payment problem between the two carriers. Id. Thus, the public interest in maintaining uninterrupted service to end-users should take precedence in the consideration of this issue. Staff Init. Br. at 5-6.

On the other hand, an equally important concern for the Staff is SBC's fear that Level 3 could avoid payment and disconnection in perpetuity. Staff Ex. 2.0 (Omoniyi), at 13. This could occur if Level 3, for example, moves its UNE lines that are not paid for, to resale service. This potential problem could be addressed by specifically forestalling migration of services that are not paid for to paid-for services. Id., at 13-14.

For example, SBC should be able to bar Level 3 from moving its UNE lines that are not paid for to resale. Id., at 14. This proposal should be more than adequate to address any attempt by a CLEC, or Level 3 in the instant case, to engage in evasive practices in which undisputed bills are not paid and yet SBC would be unable to disconnect such services of Level 3. Therefore, rather than allow large-scale and generalized disconnection of service, which could affect both paid and unpaid services of Level 3, a targeted solution which affects only the unpaid services is a better solution. Staff Init. Br. at 6.

The Staff recommends that SBC's proposal regarding the right to disconnect for products and services after two written notices have been given to Level 3 should be adopted. Staff Ex. 2.0 (Omoniyi), at 14. The Staff also recommends that the word "shall" as proposed by SBC should be adopted to provide both parties certainty on the consequences of undisputed charges. Id. In contrast, any provision that states that the disconnection "may" be undertaken for undisputed bill would likely lead to confusion and disagreement on the issue of when, how and what disconnection should be done between the parties. Finally, Level 3's concern that it should not lose its entire customer base as a result of SBC's unilateral and potentially arbitrary disconnection is valid and should be taken into account. Id., at 15. Therefore, the Staff recommends that any disconnection be specific and limited in scope to the products and services for which Level 3 has not paid and has not disputed the charges, after two reasonable written notices from SBC at well-defined intervals. Staff Init. Br. at 7.

b) Analysis and Conclusions

First, with regard to the disconnection of services for nonpayment, both carriers raise valid concerns (SBC's apprehension about, in effect, "throwing good money after bad," and Level 3's suspicion that SBC will exploit the pertinent provisions to obstruct Level 3 - a competitor - from doing business). The Commission concludes that the parties' ICA will provide other mechanisms for protecting SBC's interests and, for that reason, we will adopt Level 3's proposal to limit disconnection to the particular unpaid (and undisputed) services. Specifically, pursuant to proposed Section 7.2.3, Level 3's failure to pay an undisputed bill on time will trigger SBC's authority to demand assurance of payment. Under proposed Section 7.3.3, such assurance is equal to the amount of expected or actual charges for *all* services and products provided to Level 3 over three months. Thus, if Level 3's inadequate payment performance extends to additional services, SBC will have an earmarked reserve that takes all SBC-supplied services into account. Also, that reserve will also give SBC time (equal to the months covered by the reserve) to discontinue its provision of those additional unpaid services.

Further, as we discuss in greater detail in connection with Issue GTC-9, below, SBC will also have the power (under proposed Section 9.5.1) to decline new service orders from Level 3. This should minimize SBC's concern that Level 3 will simply

substitute a functionally equivalent service for an unpaid service, thereby rendering disconnection of the latter meaningless[22]. *E.g.*, SBC Rep. Br. at 10.

Second, the Commission agrees with SBC and Staff that the term "shall" (rather than "may") should appear in the first sentence of Section 9.2. The term pertains to whether *grounds* for disconnection have been established, not whether disconnection will actually occur. Level 3 can dispute whether the threshold circumstance (failure to pay an undisputed charge) has been properly established, but once it has been, it *is* (not "may be") grounds for disconnection.

Third, we find that SBC's proposal that Level 3 act within ten business days of an overdue notice is reasonable. As SBC emphasizes, Level 3 will have already had 30 days to evaluate SBC's charges. SBC Init. Br. at 46. Level 3 offers little to support its contention that ten business days are insufficient. Viewed pragmatically, if Level 3 remains unconvinced about the validity of a bill as the tenth business day approaches, it may choose to invoke dispute resolution procedures, averting disconnection.

8. GTC-8 What is a reasonable interval to respond to notice of nonpayment in the matter required under the ICA?

a) Parties' Positions and Proposals

(1) Level 3

Level 3 has sought 30 days to adequately respond to a notice of unpaid charges. Thus, Level 3's language in Section 9.3 and its subparts provides that the Parties allow for thirty calendar days following receipt of the notice of unpaid charges before a formal dispute can be filed. SBC offers a far more limited ten business day interval, although it states that "ideally" notice of a formal dispute would be filed before the payment due date.[23]

As previously stated, Level 3 believes that thirty calendar days is a more practical period of time during when the Parties may investigate, audit, negotiate and settle the dispute prior to triggering the formal dispute resolution terms in the Agreement. SBC's proposed ten business day period does not allow the Parties adequate time for such discussions, and will only result in the disputing party invoking the dispute resolution terms of the Agreement, unnecessarily, in order to preserve their rights under the agreement. Level 3's proposal is reasonable, and less burdensome on the Parties, as well as the Commission – allowing for informed negotiation and resolution. Further, in the event the parties cannot resolve all of their issues, the 30 days also provides an

[22] We note that such a strategy would have limited utility for Level 3. Where it is already purchasing the least-cost alternative (say, UNEs), the substitution of resold services may well preclude Level 3 from realizing a sustainable profit. Moreover, even without the ability to decline new service orders, SBC could stop resale to Level 3 after one month, in the event of nonpayment.

[23] Egan Direct, p. 34.

opportunity to limit the number of issues that will have to be brought before the Commission in the event of a formal dispute.

In light of these facts, Level 3 encourages the Commission to adopt its proposed thirty-day timeframe as detailed in GTC Appendix Sections 9.3, 9.3.1, 9.3.2, 9.3.3, 9.3.4.

(2) SBC

Pursuant to GT&C section 8.1, remittance is due within thirty calendar days of each due date. Ideally, a party should have to provide notice of a billing dispute on or before the payment due date of the disputed charge. But SBC, in the spirit of compromise, offered Level 3 language whereby the Billed Party would not have to formally dispute charges until ten business days following the receipt of a collection notice. Level 3 proposes thirty days, which would give it sixty days from the invoice date within which to pay or dispute a bill. This is unacceptable, because it would create an incentive for Level 3 to delay the filing of billing disputes and this would increase the risk of default to SBC.

Level 3's contention that ten days is not long enough to audit a bill is based on a misunderstanding of SBC's contract language. Ten business days may indeed be too short a time in order to properly audit a bill. However, when one considers that SBC's proposal actually would allow Level 3 thirty calendar days from the invoice date plus an additional ten business days to formally dispute the charges, it is difficult to understand why Level 3 is objecting to SBC's language. The Commission should resolve this issue in favor of SBC.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

Consistent with our resolution of Issue GTC-7, the Commission finds that ten business days, when combined with the initial 30-day period after bill presentation, are adequate for commencing a dispute.

9. GTC-9(a) Should acceptance of new orders and pending orders be suspended if undisputed charges are outstanding on the day the billing party has sent a second late payment notice?

(b) Should the billing party be permitted to disconnect and discontinue providing all products and services under the ICA on the day the Billing Party has sent a second late payment notice, or only those specific network elements and services for which undisputed payment has not been rendered?

a) Parties' Positions and Proposals

(1) Level 3

Level 3 should not be precluded from submitting, and SBC accepting and acting upon, new or pending orders on the day that SBC has sent out a second late payment notice. SBC contends that it would be "just not reasonable" to require SBC to continue accepting and processing orders when a second late notice for undisputed unpaid amounts is being issued. The problem here is twofold. First, the second notice may have not yet been received by Level 3. Second, the final date prior to termination contained on the second notice has not passed. In essence, SBC wants to preemptively terminate provisioning prior to that cut-off date.

Further, this approach is contrary to Level 3's endeavors to minimize formal disputes by permitting the parties adequate time to resolve any issues that may arise. As described in Issue GTC-8, Level 3 is proposing that the billed party have an additional thirty calendar days after receipt of the notice of late payment prior to formalizing the dispute. As such, unless and until the dispute is formally invoked, SBC should be precluded from freezing Level 3's orders.[24]

(2) SBC

SBC's proposed language in section 9.5.1 of the GT&C's provides that if the Non-Paying Party breaches the ICA as specified in these sections, i.e. fails to: (a) pay any undisputed amounts, (b) file a bona fide dispute for amounts in dispute by the deadline provided in the first late payment notification, (c) pay the disputed portion of a past due bill into an interest-bearing escrow account, or (d) pay any revised deposit amount or make a payment in accordance with the terms of any mutually agreed upon payment arrangement, the Billing Party will, in addition to exercising any other rights or remedies, provide a second late payment notice/written demand to the Non-Paying Party for failing to comply. At the time of the sending of the second late payment notice, the Billing Party may suspend acceptance of any new orders and suspend completion of any pending orders. Level 3 opposes SBC's proposed language.

SBC's proposed language applies only in extreme cases of non-payment and comes into play only when a party fails to pay or dispute charges even after receiving a first late payment notice. It would be neither just nor reasonable to require SBC to continue providing ordering capability to a carrier that fails, after a written demand and without justification, to pay undisputed charges for those services, and this part of the issue should therefore be resolved in favor of SBC.

Level 3 proposes that SBC only be allowed to disconnect the specific service(s) or product(s) for which Level 3 has failed to pay the undisputed amount. Level 3's proposal is unworkable because it would limit treatment options to individual services

[24] Mandell Direct, p. 20.

(presumably individual Billing Account Numbers). This scheme would be administratively burdensome for SBC and would also invite potential mischief on the part of Level 3, which could choose to transfer services between different services in order to avoid disconnection. For example, resale end users could be converted to UNE lines, which would cause the same services to be billed under different accounts. If Level 3 fails to pay any undisputed balances owed after receiving two late payment notices, SBC should be entitled to disconnect all the services provided to Level 3 under this Agreement.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

First, we reiterate our resolution of one of the disputes under Issue GTC-7: SBC may only disconnect or discontinue unpaid, undisputed service(s), not all services furnished to Level 3. SBC's interests are adequately protected by other provisions in the proposed ICA. Accordingly, Level 3's revisions to Sections 9.6.1.2 and 9.7.2.2 are approved.

Second, the Commission approves SBC's proposed authority to suspend acceptance of new service requests and completion of pending requests, as set forth in Sections 9.5.1.2 and 9.6.1.1. We reject Level 3's complaint that SBC would thus be empowered to act "preemptively" (that is, before the second overdue notice period had expired). Level 3 Init. Br. at 171. Level 3 will have already had an initial 30-day payment notice and a 10-business day overdue period to pay or dispute its bill. Suspension of new and pending business after those 40 days is a reasonable stop-loss action; it does not disrupt existing services or pre-decide any dispute about such services.

SBC's proposed Section 9.6.1.1 is disapproved, however, insofar as it permits *cancellation* of pending requests before the second overdue period expires. Suspension of further action on a pending request - which we approve in the preceding paragraph - averts the waste of additional SBC resources. Cancellation, before Level 3 has its allowed ten additional days to cure the default, potentially creates waste for both carriers, in that any time and expense already devoted to a pending request are squandered.

10. GTC-10 (Level 3)(a) Should the agreement be burdened by SBC's proposed list of certain cases that may impact the ICA, or should it merely accept the state of the law at the time the ICA is effective?

(Level 3)(b) Is it appropriate to make certain provisions of this ICA immediately invalidated upon a Parties' unilateral assertion that there has been an Intervening Law, or should

the term continue in effect pending negotiations between the Parties?

(Level 3)(c) Does SBC have the obligation to provide UNEs, combination of UNEs and commingling beyond that required by the Federal Act and FCC actions (i.e., state statutes and commission orders)?

(SBC)(a) Should the ICA identify specific cases that are apt to lead to changes in law that would impact this ICA?(

SBC)(b) Should the ICA specify that certain provisions in the ICA resulted from arbitration?

(SBC)(c) Given agreed language that provides that both parties reserve their intervening law rights "relating to the following actions," should the ICA go on to identify those actions?

(SBC)(d) Should certain provisions of this ICA be subject to immediate invalidation in the event of a change of law that renders those provisions unlawful?

a) Parties' Positions and Proposals

(1) Level 3

Level 3 does not see the benefit of allowing SBC's one-sided opinions of regarding intervening law into this Agreement. SBC's proposal seeks to include voluminous language referring to specific FCC Orders and Court rulings in the intervening law section of the agreement. SBC's language incorporates its own, biased legal conclusions pertaining to the findings of those cases and the thrust of the orders.[25] Level 3 believes that the state of the law at the time of the Effective Date is what it is, and that SBC's language buries the Agreement in minutia that is unnecessary and will only lead to confusion. SBC's language is a confusing, distorted attempt to list every case that could, may or might impact any of the terms of the Agreement in SBC's favor. If the particular case impacts the terms of the Agreement such that SBC believes that it qualifies as an Intervening Change in Law in any particular jurisdiction then it can, and should, give the appropriate notice to Level 3. The same is true for Level 3. To burden the Agreement with such confusing and unnecessary minutia creates uncertainty and the potential for future litigation as the Parties dispute the other's interpretation. As such, SBC's proposal should be rejected by this Commission.

In addition, SBC's unilateral interpretations of the numerous cases incorporated into its language are self-serving and seek to automatically impose into the agreement

[25] Mandell Direct, p. 25.

conclusions on matters that are still pending and open to interpretation. A concise change in law provision is more than adequate and appropriate to maintain the Parties' compliance with the ever changing landscape of telecommunications law. As such, the Commission should reject SBC's language in GTC Appendix Sections 21.1, 21.2, 21.3 and 21.4.

(2) SBC

Level 3 criticizes SBC's proposed intervening law language on the ground that it "buries the Agreement into minutia that is not needed and will only lead to confusion as to the intended meaning." Level 3's criticism might be valid if the question were which party's proposal is better prose, for Level 3's proposal is more concise and readable. But the correct way to think about the issue is this: Assume that at some point after the ICA goes into effect, a potential disagreement arises concerning whether a certain legal development does or does not qualify as an intervening law event for purposes of section 21. In that scenario, which party's language is more apt to resolve the potential disagreement? The answer is that SBC's language is better suited to that purpose, because it identifies with specificity many anticipated developments that would qualify for "change of law" treatment, and thus would dispose of many disputes that the parties otherwise might have – and Level 3 does not actually dispute the correctness or substance of any of SBC's language.

If the Commission does reject as overly detailed SBC's proposed language for subsections 21.1, 21.2, and 21.3, the Commission should nonetheless approve subsection 21.4, which provides much needed specificity concerning the procedure that must be followed in the event of a change of law.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

Some of the multiple sub-issues presented by the parties are not specifically addressed in the parties' briefings. Nonetheless, we will address each sub-issue, in keeping with our obligation under the Federal Act to resolve open disputes.

Level 3 GTC-10(a) & SBC GTC 10(a), (c) & (d). The Commission strongly believes that it would undermine the parties' ICA to include a list of proceedings that are "not yet fully incorporated into the [ICA]." Applicable laws, orders and regulations that are in force on the effective date of the ICA should be accounted for in that agreement. Future rulings or changes should be addressed, as they arise, via the ICA's change-of-law provisions. Predictions about the outcomes of proceedings only inject uncertainty into an agreement that is intended to make the parties' interconnection predictable.

We are distinguishing here between an interconnected carrier's concern about involuntary waiver of its right to pursue its interests in other forums (principally,

appellate tribunals and at the FCC), and its "intervening law rights" under the ICA. We agree that the carrier's participation in negotiations, arbitrations and ICAs, as required by the Federal Act, should not, by itself, constitute an abandonment of that carrier's position in other forums, even if such positions contradict ICA terms applicable to that carrier. The Commission assumes the contract language associated with SBC GTC-10(b) (i.e., the first sentence of SBC's proposed Section 21.1) is intended to emphasize that certain ICA provisions either resulted from give-and-take between the carriers or were imposed by the Commission and, for either reason, should not be construed as waivers. That language can be fairly included in the ICA.

However, within the four corners of the ICA, the carrier should have no "intervening law rights" beyond those set forth in the ICA's change-of-law provisions. Even if we assume *arguendo* that a particular appellate or FCC proceeding is "apt to" affect the parties' rights under the ICA, the nature of that impact, and the appropriate measures for incorporating it, are not knowable in advance and it is unsound to construct "intervening law rights" on guesswork. On the other side of the coin, the "intervening law rights" each party should retain - the rights contained in the change-of-law process - should not be waived in advance of the intervening law event, and nothing in the ICA here should have that effect.

Level 3 GTC-10(b) & SBC GTC 10(d). We also conclude that it would be highly detrimental to the parties and the public they serve to authorize immediate and unilateral action by either party to invalidate, discontinue or modify their rights and responsibilities under the ICA. As exemplified by Issue UNE-1 in this arbitration, the carriers will not necessarily agree about whether, and how, a new ruling or law affects their duties. Accordingly, actions based on one party's interpretation of new law (and, indeed, whether such law is even "new"), cannot be fairly allowed[26]. Additionally, even if a unilateral interpretation were ultimately correct, immediate action may harm associated interests of the parties, their customers and the public generally. The ICA's change-of-law mechanisms are intended to address deletions of service from the ICA, just as they address additions. In that way, disengagement occurs rationally, with due regard to stakeholders. Furthermore, SBC will not be financially harmed while orderly processes are conducted (although competitive advantage associated with new law may be postponed). Level 3 will still be obliged to pay for the products and services it obtains.

Level 3 GTC-10(c). The final sentence of SBC's proposed Section 21.2 is unacceptable for two critical reasons. First, it ignores those provisions of *Illinois* law that require unbundling and commingling. Second, it specifies that the rules and decisions of the FCC and the courts must be "lawful." That is an invitation to litigation about the validity of effective rulings of courts and agencies, essentially empowering either carrier to launch a collateral attack on those rulings (presumably, but not necessarily, before

[26] Our conclusion applies to the pertinent language in both SBC proposed Sections 21.1 and 21.4, and to any other text that would accomplish by implication what those sections would accomplish expressly.

this Commission). If a judicial or FCC ruling is effective, it is *ipso facto* "lawful" until overturned or rescinded by proper authority beyond this Commission.

11. GTC-11 Should Level 3 be allowed to assign or transfer this ICA to an affiliate with whom SBC already has an ICA?

a) Parties' Positions and Proposals

(1) Level 3

SBC's language in section 29.1 attempts to limit Level 3's ability to assign or otherwise transfer this Agreement to a Level 3 affiliate, if that affiliate already has an existing interconnection agreement with SBC. Level 3 understands SBC's objection to this sort of assignment is based solely on SBC's asserted limitations in its billing systems.[27] Allowing inflexible billing system processes to inhibit Level 3 from implementing strategic business plans and practices is not an appropriate balancing of the Parties' interests.

Further, SBC's proposed limitation on Level 3, from assigning the Agreement, does not reciprocally limit SBC in its ability to assign the agreement to another SBC Affiliate with whom Level 3 may have an agreement. For these reasons, SBC's proposals in Section 29.1 are unreasonable and should be rejected by this Commission.

(2) SBC

The question presented by this issue is whether Level 3 will be permitted to assign or transfer this ICA (or parts of it) to a Level 3 affiliate that already has an interconnection agreement with SBC. Such an assignment or transfer cannot be permitted, because if the affiliate already has an interconnection agreement with SBC, the affiliate is bound by, and limited to, the rates, terms and conditions of its agreement for the term of that agreement.

If the affiliate with an interconnection agreement were to ask SBC to negotiate replacement language (other than language compelled by a change of law) to take effect before the term of the agreement expired, SBC would be well within its rights if it refused, on the basis that the affiliate must honor its existing agreement for the remainder of its term. Similarly, if the affiliate attempted to adopt, while it still had a valid ICA with SBC, the terms and conditions of another CLEC's existing interconnection agreement pursuant to Section 252(i) of the 1996 Act, the affiliate would not be permitted to do so, because it would be bound by the terms of its existing agreement for the remainder of its term. *See*, Global NAPS, Inc. v. Verizon New England, Inc., Nos. Civ.A.03-10437-RWZ, 02 12489-RWZ, 2004 WL 1059795 (D. Mass. May 12, 2004) (holding CLEC with existing arbitrated interconnection agreement was not entitled to opt into a different agreement under Section 252(i)); New England Tel. Co. v. Conn. Dept.

[27] Level 3 Ex. 4.0 at 26.

of Pub. Util. Co., 285 F. Supp. 2d 252, 254 (D. Conn. 2003) ("An entering CLEC can *either* opt into an existing interconnection agreement between the [incumbent] LEC and another CLEC, *or* it can negotiate [and arbitrate] its own interconnection agreement") (emphasis added).

For the same reasons, the affiliate cannot take on by transfer or assignment, in this instance from Level 3, terms and conditions of an interconnection agreement different than the agreement it already has; the affiliate must honor its agreement for the remainder of its term. Accordingly, Level 3 cannot properly be permitted to transfer or assign its interconnection agreement, in whole or in part, to its affiliate that has a current agreement with SBC, and SBC's proposed language to that effect should be adopted.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

SBC raises the concern that Level 3 might transfer the ICA to a Level 3 affiliate for competitive benefit (presumably, because the terms of this ICA were either: 1) more advantageous to Level 3 than the terms of the affiliate's ICA or; 2) so disadvantageous that Level 3 would hope to extinguish the ICA by transferring it). Level 3 complains that SBC's proposal is not reciprocal (presumably, because SBC might seek the same competitive advantage it fears Level 3 would seek). The Commission concludes that the ramifications of this dispute have not been sufficiently illuminated by the parties' arguments. For example, the parties do not address the implications of a transfer in the context of a business consolidation, in which Level 3 disappeared as a formal entity. Would the ICA be assignable in that context, or would it disappear along with the putative assignor's telecommunications certificate? Similarly, how would an assignee (of Level 3 *or* SBC) operate under two ICAs - or could one (which one?) be abandoned? Indeed, the latter issue would also arise from a transfer to an unaffiliated provider with an existing ICA.

On the limited record here, we hold that transfers to affiliates with existing ICAs should not be authorized for *either* party here. Without a clear view of the validity and consequences of such transfers, the Commission will not permit them in this ICA.

B. Definitions ("DEF")

1. DEF-1 Should the definition of Access Tandem Switch be limited to IXC-carried traffic or should it include IntraLATA toll Traffic, Section 251(b)(5) Traffic and ISP-Bound Traffic and ISP-Bound Traffic?

a) Parties' Positions and Proposals

(1) Level 3

Level 3's definition is consistent with the historical definition of an Access Tandem, where Access Tandems were only used for passing traffic to IXCs. SBC's definition of access traffic differs, depending on the state involved, and where SBC has embedded traffic distinctions in the definition.[28] For consistency between all of the SBC states for which Level 3 has negotiated, the Commission should adopt a single, consistent definition based upon the historical application of the term. As such, Level 3's definition is from Newton's Telecom Dictionary, 18th edition, a standard reference for telecommunications terminology. Use of a universally accepted definition such as the Newton's definition will avoid disputes over traffic types in the definition of switches, and is the most reasonable approach for resolving this issue. Therefore, the Commission should reject SBC's definition of "Access Tandem" and accept Level 3's standard definition of the "Access Tandem."

(2) SBC

The issue here is whether the definition of "access tandem switch" should be limited to IXC-carried traffic (as proposed by Level 3) or whether it should include IntraLATA toll traffic, Section 251(b)(5) traffic and ISP-bound traffic (as proposed by SBC). SBC's position is that its tandem switches are capable of handling many different traffic types – not just IXC-carried traffic. Therefore, the definition of "access tandem switch" should refer to all the types of traffic that are capable of being handled by SBC's access tandems – not just IXC-carried traffic.

In addition, it is not enough to include in the ICA only a definition of the term "access tandem." Access tandems handle specific types of traffic and often do not handle other types of traffic. For example, SBC's "Local Only" tandem switches handle 251(b)(5) non-IntraLATA local traffic and ISP-bound traffic, but not IXC traffic; and SBC's "Local/Access" tandem switches handle Section 251(b)(5)/IntraLATA and IXC carried traffic, but not ISP-bound traffic. The ICA should define each type of tandem switch in SBC's network (local/access tandem switch, local/IntraLATA tandem switch, local only tandem switch, and local tandem switch) in accord with the type of traffic the tandem is provisioned to carry, as proposed by SBC in GT&C Definition Issues 9, 11, 12, and 14.

---

[28] Wilson Direct, p. 49.

Level 3 has agreed to route only local traffic to local-only tandem switches precisely because those tandem switches are provisioned to handle only that type of traffic. And SBC has such a local-only tandem switch in Illinois. Moreover, Level 3 does not claim that SBC's proposed definitions are wrong; rather, Level 3 claims they are unnecessary. But that is not true given that (1) Level 3 itself has agreed to route only local traffic to local-only tandem switches and (2) the parties mention the various types of tandem switches in disputed and agreed to provisions of the ICA. Level 3 proposes that the definitions for the various types of tandem switches proposed by SBC (see GT&C Definition Issues 9, 11, 12, and 14) be replaced with one definition of the term "tandem switch" as follows: "A switching machine within the public switched telecommunications network that is used to connect the switch trunk circuits between and among other central offices switches. . . . " That proposal should be rejected for all the reasons explained above.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

On its surface, this issue is about defining a switch. SBC wants a definition that reflects the "real world" of its switches as they presently function. SBC Rep. Br. at 17. Level 3 prefers what it describes as a standard definition that has been used historically. Level 3 Init. Br. at 174. The Commission concludes that it is more constructive, in the particular context here, to utilize a definition that captures the actual usage and capability of the pertinent switches, as SBC recommends.

However, the Commission recognizes that this seeming definitional issue is, like others in this arbitration, ultimately about the carriers' core conflicts regarding intercarrier compensation, IP-enabled traffic and trunking configuration. As we discuss in connection with other issues in this arbitration, these matters are under consideration or review by the FCC in ongoing proceedings, some of which may produce new or revised requirements in the very near future. It is likely that such requirements will trigger the change-of-law provisions in the parties' ICA. Accordingly, the Commission will approve definitions that provide sufficient flexibility to accommodate foreseeable regulatory changes without creating uncertainty within the original text of the ICA.

To that end, while rejecting Level 3's proposed text, we will also modify SBC's proposed language, so that the words "capable of being" will follow the second "is" (with the result that an "Access Tandem Switch" will be defined as a "switching machine…that *is capable of being* used to connect…ISP-bound traffic"). In this way, we preclude the interpretation that the subject switch is inherently limited to specific traffic (although the switch presumably *will be used* for specific traffic, pursuant to rulings we make elsewhere in this Arbitration Decision, particularly in Issues ITR-11 and 12).

Additionally, for the reasons discussed in our resolution of Issue DEF-18 and IC-3, below, the term "251(b)(5) Traffic" should not be used. It should be replaced with either "Telephone Exchange Service Traffic" or "Local Traffic."

2. DEF-2 In the event that the Commission agrees with Level 3 in the Intercarrier Compensation Appendix Section 4.5 that the Parties should not be required to use "CPN" in the call flow for IP-Enabled Traffic but rather should use "Call Record", should the Commission incorporate Level 3's proposed definition for "Call Record"?

a) Parties' Positions and Proposals

(1) Level 3

Level 3 proposes utilizing the phrase "Call Record" when discussing the Parties' obligations to provide identification data within the call flow of circuit switched traffic, as compared to SBC's proposed use of the Calling Party Number ("CPN") data for all traffic. Level 3 believes the "Call Record" reference allows for more flexibility for the Parties to agree to new or different technologies in recording. SBC's "CPN" reference limits the Parties to only that form of technology.

Further, the technology does not exist that will allow for "CPN" to be included in the call flow of IP-Enabled Traffic. In practical terms, the issue of whether the "call record" definition should be included will be determined when the Commission addresses Level 3's language in Section 4.5 of the Intercarrier Compensation Appendix. Accordingly, the Commission should adopt Level 3's language regarding "Call Record."

(2) SBC

This issue concerns Level 3's proposed definition of "Call Record," a term that Level 3 proposes to use in Sections 4.1 through 4.5 of Appendix Intercarrier Compensation instead of the industry-standard term CPN. SBC asserts that the Commission should reject Level 3's proposal to replace the term CPN with the term "Call Records," for the same reasons SBC identifies in its discussion of IC Issue 8. CPN is defined by FCC regulation (47 C.F.R. § 64.1600(c)), and is used throughout the industry for the billing of intercarrier traffic, while "Call Records" is a term newly invented by Level 3. Because Level 3's new term "Call Record" should not be used in the parties' agreement, there is no reason to define that term, and Level 3's proposed definition should be rejected.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

This definitional dispute is linked to Issue IC-8, where the parties propose to attach either "Call Records" (Level 3) or CPN (SBC) to the traffic they exchange. The Commission perceives Level 3's "Call Record" proposal as part of its overall recommendation for the treatment of IP-enabled services in the parties' ICA. In our resolution of Level 3 sub-issue IC-2(a), below, we conclude that we cannot and will not make substantive rulings in this arbitration regarding IP-enabled services, over which the FCC has asserted exclusive jurisdiction. Therefore, based on our assumption that Level 3 advocates "Call Record" in conjunction with IP-enabled services, we will not approve its inclusion in the ICA.

However, even if Level 3 proposes "Call Record" for other purposes, we would reject it, so that there is no conflict with respect to our rulings, below, on Issues IC-18 and IC-19. In both instances, we disapprove of Level 3's recommendation to allow the use of unidentified formats for collecting and exchanging billing-related information. Moreover, Level 3's "Call Record" definition contains an unacceptably indefinite reference to an alternative format, thereby removing certainty from the parties' relationship under the ICA.

3. DEF-3 (Level 3) Should the categorization of Circuit Switched Traffic be consistent with the FCC's orders that distinguish Circuit Switched Traffic from IP enabled Traffic?

(SBC)(a) Should the Commission adopt a definition of "Circuit Switched IntraLATA Toll Traffic"?

(SBC)(b) If the answer to (a) is yes, should Circuit Switched IntraLATA Toll Traffic be identified consistent with FCC orders as that traffic between the Parties' local calling areas within one LATA in the State?

a) Parties' Positions and Proposals

(1) Level 3

Through its orders and regulations, the FCC has distinguished between Circuit Switched Traffic and IP-Enabled Traffic, finding that IP-Enabled Traffic is not a Circuit-Switched form of traffic. As detailed in the arguments found in the Intercarrier Compensation section of Level 3's Brief, there are a number of distinguishing results that differentiate the two types of traffic, not the least of which is that access charges apply to Circuit Switched Traffic and not to information services such as IP-Enabled Traffic.

Level 3 believes that the Agreement should include the definition of Circuit Switched intraLATA Toll Traffic in order to clarify those types of traffic to which access charges would apply. Level 3's language in various parts of the Agreement includes the

term Circuit Switched IntraLATA Toll Traffic, so there should be a definition in the agreement to clarify what is meant when the term is used. The FCC, in its most recent ruling on IP-Enabled Traffic provides the definition that Level 3 proposes for Circuit Switched IntraLATA Toll Traffic, and this Commission should adopt Level 3s language in GTC Def Issue 3.

(2) SBC

The Commission should reject Level 3's proposed definition of "Circuit Switched IntraLATA Toll Traffic," because that term should not appear in the parties' agreement. As SBC explains under IC Issues 2 and 3, Level 3's proposal to create a distinction between "IP-Enabled" and "Circuit Switched" traffic is inappropriate and inconsistent with federal law, and thus the Commission should reject Level 3's proposed terminology.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

There is no need for a definition of "Circuit Switched IntraLATA Toll Traffic" in the ICA. Level 3's interest is in differentiating IP-enabled traffic from other toll traffic. In resolving Level 3 Issue IC-2(a), below, we hold that we cannot and will not render any substantive rulings concerning IP-enable services. Additionally, the parties agree that "IP-in-the-middle" traffic is subject to otherwise applicable access charges. Therefore, a definition of "Circuit Switched IntraLATA toll Traffic" would be superfluous. Moreover, since the ICA already contains a definition of "IntraLATA Toll Traffic," on which the parties have agreed, an additional definition pertaining to the same traffic would be confusing and susceptible to dispute.

The Commission notes that even if we addressed IP-enabled services in this arbitration, we would not approve a traffic category ("Circuit Switched IntraLATA toll Traffic") that would exist for the sole purpose of excluding IP-enabled traffic. Instead, we would most likely direct the parties to create a separate appendix for IP-enabled traffic, so that definitions and provisions applicable to other traffic categories would not need to be contorted to accommodate, or eliminate, IP-enabled services.

4. DEF-4 (Level 3) Does the FCC's Interim Order maintain the status quo as of June 15, 2004 of the parties' existing interconnection agreement with respect to the availability of UNEs?

(SBC)(a) Should the Commission adopt a definition of "Declassified" and "Declassification"?

(SBC)(b) If the answer to (a) is yes, should the definition of "Declassified" and "Declassification" take into account FCC rules and judicial orders regarding which network elements must be provided as UNEs?

a) Parties' Positions and Proposals

(1) Level 3

As detailed in UNE Issue 1, Level 3 maintains that the Interim Order adopted by the FCC on July 21, 2004 (rel. August 20, 2004) maintains the *status quo* that existed as of June 15, 2004 for the provision of unbundled network elements from SBC to Level 3. As of June 15, 2004, Level 3 was entitled to receive unbundled network elements pursuant to the terms and conditions of the parties' Interconnection Agreement that was approved by the Commission. Level 3 does not wish to waive its rights to obtain unbundled network elements pursuant to those existing terms and conditions.

In addition, the FCC has held that Level 3 and SBC may not arbitrate new agreements until after the FCC adopts permanent rules for the provision of unbundled network elements: "Moreover, if the vacated rules were still in place, competing carriers could expand their contractual rights by seeking arbitration of new contracts, or by opting into other carriers' new contracts. The interim approach adopted here, in contrast, does not enable competing carriers to do either." ¶23. According to the FCC, "such litigation would be wasteful in light of the [FCC's] plan to adopt new permanent rules as soon as possible." ¶17. The FCC recognizes that "the implementation of a new interim approach could lead to further disruption and confusion that would disserve the goals of section 251."

Therefore, the Commission should adopt its position of maintaining the *status quo* and reject SBC's inappropriate attempt to include terms for "Declassification" and "Declassified."

(2) SBC

This issue concerns the terms "Declassified" and "Declassification," which are used in Section 2 and subtending sections of SBC's proposed Appendix UNE. In those sections, SBC defines a "declassified" UNE as a network element that once was required to be unbundled by the FCC but that, as a result of subsequent FCC or court decisions, is no longer required to be unbundled. *See* SBC's Appendix UNE, §§ 2.1.1 and 2.1.2. If a UNE is declassified, SBC proposes a transition procedure by which, after 30 days' advance written notice to Level 3, SBC could cease providing the declassified element, though Level 3 has the option of disconnecting or discontinuing its lease of the former UNE before then or purchasing it under a different, non-UNE arrangement. *Id.,* § 2.5.

SBC includes these provisions on declassification because the history of the FCC's unbundling rules has been one of repeated court reversals – in 1999, in 2002,

and again in 2004. As a result, SBC has consistently entered into interconnection agreements requiring it to provide UNEs that were required to be unbundled at the time, but that the courts later hold should never have been unbundled. SBC contends that attempting to amend its interconnection agreements to reflect these new rules has proven cumbersome, time-consuming, and sometimes unsuccessful, even when the courts have plainly vacated the relevant FCC rules. For this reason, SBC proposes a specific, streamlined procedure for future declassifications that gives Level 3 ample notice before any UNE is disconnected and allows Level 3 to make alternative service arrangements.

As for the specific definition of "declassified," there can be no doubt that SBC must take into account both FCC rules and orders and court decisions on review of those rules and orders. Declassification can occur by either court or FCC action, as SBC's proposed language properly recognizes. SBC Appendix UNE, § 2.1.2. Level 3's objection to these definitions seems to be that they would allow SBC to "unilaterally" determine when a UNE has been declassified. SBC denies that allegation, stating that Section 2.1.2 of SBC's Appendix UNE makes clear that declassification occurs by an act of courts or regulators, not by SBC. If Level 3 in good faith disagrees that a UNE has been declassified, it can pursue its remedies.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

As we did in the XO/SBC Arbitration[29], the Commission would approve a definition of "Declassified" or "Declassification" if it were properly worded and limited to UNEs that, as of the Effective Date of the parties' new ICA, were no longer required to be provided with TELRIC pricing. However, SBC's proposed definition will need to be substantially revised to meet our requirements.

First, with respect to future regulatory or judicial decisions affecting unbundling, a party must use the ICA's change-of-law provisions and not take unilateral action to implement its own vision of such decisions. We disagree with SBC that the "fact and scope" of future "declassifications" will be "evident." SBC Init. Br. at 57. The UNE-related disputes in this proceeding exemplify the battles that inevitably follow regulatory decisions that meaningfully affect carrier revenue. Furthermore, even if the "fact and scope" of regulatory action were "evident," the manner of implementing regulatory change would not necessarily be so. To promote consumer welfare and the public interest, we may need to carefully manage the transition away from unbundling, as the

[29] XO Illinois, Inc., Petition for Arbitration of an Amendment to an Interconnection Agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, Docket 04-0371, Order Oct. 28, 2004.

FCC has done in the Status Quo Order[30] and elsewhere. Thus, we do not regard our review of contract amendments as "drawn-out proceedings," as SBC says, SBC Init. Br. at 57, but as a sound and statutorily mandated safeguard against disruptive and unilateral action[31]. Accordingly, any definition of "declassification" in the ICA should not be forward-looking.

Second, for the reasons articulated in our resolution of Issue GTC-10)c), any description of FCC or judicial orders or rules as "lawful" must be removed. It is certainly not up to these carriers - much less to SBC alone - to second-guess the lawful nature of decisions by the FCC, the courts or this Commission. Such decisions are lawful until withdrawn or overturned by superior authority.

Third, and similarly, the exclusive connection of "lawful" UNEs to subsection 251(c)(3) of the Federal Act must also be removed. Illinois, through statutes and orders of this Commission, also imposes unbundling requirements. Section 271 of the Federal Act also requires unbundling, either in conjunction with Section 251 or independently.

We note here that the Level 3 arguments pertaining to this issue are neither well-founded nor clearly relevant to the issue as framed. Those arguments are more appropriately presented in connection with Issue UNE-1.

5. DEF-5 (Level 3) Should the Demarcation Point be defined consistent with FCC's definition and regulations?

(SBC) Should the Demarcation Point serve as the legal, technical and financial boundary between the Parties networks?

a) Parties' Positions and Proposals

(1) Level 3

47 CFR 68.3 defines Demarcation point as follows:

> As used in this part, the point of demarcation and/or interconnection between the communications facilities of a provider of wireline telecommunications, and terminal equipment, protective apparatus or wiring at a subscriber's premises.

[30] In the Matter of Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket 04-313 & CC Docket 01-038, Order and Notice of Proposed Rulemaking, rel. Aug. 20, 2004. ('Status Quo Order" or "Interim Order")

[31] Our resolution of Issue REC-1, below, also reflects this principle.

If this definition sounds familiar, that is because it is the exact definition Level 3 proposes for adoption into this Agreement. Consistent with the FCC orders and regulations, including 47 CFR 68.3 above, Level 3 proposes articulating the fact that the Demarcation Point serves not only as the boundary line between the Parties' networks, but also the legal, technical and financial responsibilities. Based upon SBC's own witness testimony, it appears that SBC agrees with the concept that the Demarcation Point (in the case of Level 3, its point of interconnection ("POI")) should serve as the boundary between the Parties' networks for legal, technical and financial responsibility for their respective facilities. In fact, SBC admits that the POI is the "financial demarcation point for [the] facilities" and "[e]ach company is responsible for its own facilities on its respective side of the POI"[32], but SBC's interconnection proposals contradict these statements.

Level 3 believes this clarification will remove confusion and possible litigation in the future, as it draws a clear line where the two parties responsibilities end. Therefore, the Commission should adopt Level 3's definition of the term "Demarcation Point" as it is consistent with the FCC rules, and reject SBC's definition.

(2) SBC

The agreed portion of the definition of "demarcation point" says everything that needs to be said about what a demarcation point is; the demarcation point is a certain, specified physical point. Level 3 is improperly attempting to expand the definition of "Demarcation Point" to delineate the parties' respective substantive legal, technical and financial rights and obligations. Such language is more appropriately included in specific substantive appendices, and is in fact already included in various appendices. *See, e.g.,* Appendix 911, § 4.2.11 Moreover, the rights and obligations of the respective parties will depend on the context in which the term "Demarcation Point" is being used. For that reason, Level 3's language is overly simplistic.

SBC's proposed language comports with the accepted, industry-wide notion of "Demarcation Point" and should be adopted.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

Level 3 purports to adhere to the definition of "Demarcation Point" at 47 CFR 68.3, Level 3 Init. Br. at 177, but Level 3's proposed text exceeds that definition. Moreover, as SBC maintains, the substantive effect of the Demarcation Point on the parties' rights and duties is - or ought to be - addressed elsewhere in the ICA. SBC Init. Br. at 57. Level 3's proposed addition to the definition in DEF-5 could create confusion

[32] Albright Direct, p. 18.

with those other provisions specifically applicable to the parties' legal, technical and financial rights and duties. Therefore, it should not be included in the ICA.

6. DEF-6 Should the definition of a digital cross connect (DSX) panel be limited to only T1 lines which is only one of the possible ways a party can connect with the DSX panel?

The parties have settled this issue.

7. DEF-7 (Level 3) Should the Commission define an ISP according to MTS and WATS Market Structure Order, CC Docket No. 78-72, adopted in 1983, or should the commission adopt a more current statement of the law as adopted by FCC?

(SBC) Should the definition of Internet Service Provider include reference to paragraph 341 of the FCC's First Report and Order in Docket No. 97-158?

a) Parties' Positions and Proposals

(1) Level 3

Level 3 notes that in the FCC's First Report and Order[33] in CC Docket No. 97-158, specifically incorporated in SBC's language, the FCC adopts a definition of Internet Service Provider ("ISP") that stems from the Modified Final Judgment, adopted in 1983. Thus, SBC is asking this Commission to adopt a definition for ISP that is more than 20 years old. Level 3 believes that the Commission should adopt a more flexible definition, which will allow for the incorporation of more recent FCC orders defining the term, and will incorporate upcoming FCC decisions expected related to IP-Enabled Traffic and intercarrier compensation, which may alter or amend the definition yet again. As such, the Commission should adopt Level 3's definition.

(2) SBC

The Commission should adopt SBC's proposed definition of ISP and reject Level 3's. Level 3 essentially offers no concrete proposal at all, but proposes that ISP be "defined consistent with the FCC in its Orders and regulations." That proposal is unreasonable, because Level 3 does not even hint at what definition is "consistent" with the FCC's orders.

The purpose of an interconnection agreement is to define the parties' rights and obligations in a concrete manner. For instance, with respect to UNEs, the contract does

[33] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15,499 (rel. Aug. 8, 1996), *reversed and vacated in relevant part by* AT&T Corp. v. FCC, 525 U.S. 366, 388-91 (1999) ("First Report and Order" or "Local Competition Order")

not merely state that UNEs will be provided "consistent with the FCC in its Orders and regulations," but defines the particular UNEs that will be provided, and the particular rates, terms, and conditions upon which those UNEs will be provided. Similarly, the term "ISP" is used in many contract sections, and thus, should be defined in a concrete manner so that the parties can determine their rights and obligations under the contract. ISP should be defined in a manner consistent with the FCC's orders, but the term should also be *defined* – which is what Level 3 fails to do.

SBC proposes to define an ISP as "an Enhanced Service Provider that provides Internet Services and is defined in paragraph 341 of the FCC's First Report and Order in CC Docket No. 97-158." SBC's proposed definition of ISP, unlike Level 3's, is both concrete and consistent with the FCC's definition of an ISP. Thus, the Commission should adopt SBC's proposed definition.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

The Commission agrees with SBC that Level 3's proposed text ("defined consistent with the FCC in its Orders and regulations") provides no specificity for the parties and, for that reason, is inadequate. SBC Init. Br. at 58. Insofar as Level 3 urges that the ICA remain sufficiently "flexible" to incorporate "upcoming" FCC decisions, Level 3 Init. Br. at 179, such flexibility is provided by the ICA's change-of-law provisions.

SBC's own proposal is little better, however. The Commission perceives no benefit from a definition that refers the reader to an FCC order, when the applicable language could simply be incorporated into the ICA. While reference to a lengthy text in another document might sometimes be preferable to incorporation, the language involved here is not lengthy. Furthermore, the footnote referenced by SBC refers to "interstate" communications, which, according to SBC itself, are not covered by the subject ICA.

Nonetheless, SBC's text is the only concrete text offered by the parties. Level 3 complains that SBC's text fails to incorporate other FCC decisions, but Level 3 fails to develop or support its claim. Accordingly, SBC's proposed definition can be included in the ICA, if it is set out in full and made applicable to the intrastate traffic this Commission regulates. The impact of future FCC decisions on that definition, if any, will be addressed through the ICA's change-of-law mechanisms.

8. DEF-8 (Level 3) Should ISP-Bound Traffic be identified as originating as a call that originates on the circuit switched network and terminates to an Internet Service Provider?

(SBC) Should the definition of "ISP-Bound Traffic" reference the FCC's ISP Compensation Order and be limited to certain physical locations of the end user and terminating ISP?

a) Parties' Positions and Proposals

(1) Level 3

SBC's language in GTC DEF Issue 8 again attempts to place a geographic requirement to define a type of traffic. As discussed in great detail in the issues related to Intercarrier Compensation, there is no nexus between the physical locale of the calling party and the ISP. Rather, the FCC has held that all ISP-Bound Traffic is interstate in nature and subject to the compensation scheme developed in the ISP Remand Order[34].

Level 3's language clarifies that ISP-Bound Traffic is originated as circuit-switched traffic terminating at an ISP customer of the other Party. This language is consistent with the language used in FCC orders.[35]

For the reasons detailed above and in the Intercarrier Compensation section, this Commission should reject SBC's attempt to inject a requirement that the calling parties be physically located in a certain geographic location in order to make ISP-Bound Traffic. The FCC has never required such a limitation, and neither should this Commission. Therefore, the Commission should adopt Level 3's definition of "ISP-Bound Traffic" as it is consistent with FCC Orders.

(2) SBC

This issue concerns whether, for purposes of application of the FCC's ISP Remand Order compensation plan, "ISP-Bound Traffic" should be limited to traffic from an originating end user to an ISP located in the same local exchange area. SBC's position on this issue is fully discussed in IC Issue 5, which discussion is fully incorporated by reference herein. As SBC explains there, the Commission should adopt SBC's proposed definition because that definition, unlike Level 3's, complies with the ISP Remand Order.

---

[34] Order on Remand and Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 / Intercarrier Compensation for ISP-Bound Traffic, FCC No. 01-131, CC Docket No. 96-98; 99-68 (April 27, 2001)(hereafter "ISP-Bound Traffic Order" or "ISP Remand Order" or "ISP Compensation Order")

[35] ISP Remand Order, FCC 01-0131 (April 27, 2001) at ¶61.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

The Commission rejects SBC's proposal to define ISP-bound traffic as traffic in which the caller and called party are physically present in the same SBC local exchange area or extended local exchange area. SBC's definition (in SBC's proposed sections 3.2 and 3.3) is premised on SBC's view that the FCC's ISP Remand Order[36] addressed only local ISP-bound traffic. SBC misinterprets the ISP Remand Order. In that decision, using an end-to-end analysis, the FCC found that ISP-bound traffic is "largely interstate." Nonetheless, the FCC subjected all ISP-bound traffic to a bill-and-keep scheme (assuming no prior traffic exchange, pursuant to an ICA, between the pertinent carriers), not to interstate access charges. Thus, the ISP Remand Order does not support SBC's contention that an ISP-bound call would be subject to intrastate access charges when an FX or VNXX arrangement is employed to complete that call. Under the ISP Remand Order, the "real," or geographic, location of the ISP, and the geographic path by which calls reach the ISP, are irrelevant to intercarrier compensation. Putting it another way, pursuant to the analysis and rationale of the ISP Remand Order, all ISP-bound calls are equal, irrespective of their end-point, and all such traffic would be subject to either reciprocal compensation or bill-and-keep, not access charges.

For the reasons set forth in our resolution of Level 3 Issue IC-2(k), below, Level 3's proposed term, "Circuit Switched Traffic" should not be used in the parties' ICA.

9. DEF-9 (Level 3) Should the definition of "Local/Access Tandem Switch" also include a substantive provision that would require Level 3 to build duplicative interconnection trunks?

(SBC)(a) Should the Commission adopt a definition of "Local/Access Tandem Trunk"?

(SBC)(b) Should the definition of "Local/Access Tandem Switch" reflect that such switches are used for Section 251(b)(5)/IntraLATA Traffic and IXC-carried traffic?

[36] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic, CC Dockets 96-98 & 99-68, Order on Remand and Report and Order, rel. April 27, 2001.

a) Parties' Positions and Proposals

(1) Level 3

Level 3 takes the position throughout this arbitration that SBC has the obligation under Section 251 to interconnect its network for the exchange of traffic between the parties. SBC also has the obligation to interconnect in a manner that allows Level 3 to exchange traffic in a manner consistent with the manner in which SBC exchanges traffic with itself, its affiliates and any other party. This includes the obligation to allow for Level 3 to exchange all types of traffic over the local interconnection trunks and facilities of SBC, which SBC does for itself and other CLECs. For a detailed explanation of the rationale for this position, please see the ITR Issues section above.

SBC's definition of "Local/Access Tandem Switch" contains embedded traffic distinctions that are unreasonably restrictive, and as such, should not be used. Particularly troubling is that SBC has excluded ISP-Bound Traffic from the traffic types listed – an exclusion which they have interestingly included in other switch definitions. SBC accomplishes this by limiting the definition with its newly-crafted term "Section 251(b)(5) Traffic", which SBC asserts excludes ISP-Bound Traffic. By inserting in the definitions an aspect applying a "local" requirement, SBC is, in effect, prohibiting Level 3 from exchanging anything other than "local" traffic over these facilities. In contrast, Level 3's more generic definition does not restrict traffic types.

Level 3 believes that the dispute over ISP-Bound Traffic does not belong in the definition of switching. To the extent that the Commission requires the Parties to define the tandem functionality, Level 3's language is taken from Newton's Telecom Dictionary, 15th Edition, a source commonly accepted within the telecommunications industry. Since tandem switches will handle any type of traffic, Level 3's definition, "an intermediate switch or connection between an originating telephone call location and the final destination of the call," is the more rational definition and should be adopted by the Commission.[37]

(2) SBC

GT&C Definition Issue 9(a) is whether the term "local/access tandem switch" should be included in the ICA. Level 3 opposes including a definition of this term in the ICA, even though the term is used throughout various appendices, including the GT&C Definitions and ITR Appendices, in both agreed and contested provisions. Because this term appears throughout the ICA, SBC's definition of it should be included in the ICA.

As SBC explained in connection with GT&C Definition Issue 1, SBC's network architecture includes tandems that have been provisioned to handle specific types of traffic. One of these types of tandems is a Local/Access Tandem. This tandem is

[37] Wilson Direct, pp. 51.

provisioned to handle Section 251(b)(5)/IntraLATA traffic and IXC-carried traffic. It should be defined accordingly.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

The analysis and conclusions in our resolution of Issue DEF-1, above, apply here as well. As we stated there, and for the same reasons, the words "capable of being" should be inserted after the second "is." Again, our purpose is to preclude the interpretation that the subject switch is inherently limited to specific traffic (although the switch presumably *will be used* for specific traffic, pursuant to rulings we make elsewhere in this Arbitration Decision, particularly in Issues ITR-11 and 12). Also, for the reasons included in our resolution of Issues DEF-18 and IC-3, below, the term "251(b)(5) Traffic" should be replaced with either "Telephone Exchange Traffic" or "Local Traffic."

10. DEF-10 (Level 3) Should the definition of "Local Interconnection Trunk" also include a substantive provision that would require Level 3 to build duplicative interconnection trunk?

(SBC)(a) Should the Commission adopt a definition of "Local Interconnection Trunk Groups"?

(SBC)(b) If the answer to (a) is yes, should "Local Interconnection Trunk Groups" be defined as trunks used to carry Section 251(b)(5) IntraLATA Traffic only?

a) Parties' Positions and Proposals

(1) Level 3

As detailed in ITR Issue 11 and GTC DEF Issue 9 above, SBC is attempting throughout its proposed language in this Agreement to limit the use of the interconnection trunks to a subset of traffic types. The Commission's decision on that Issue should be adopted into this definition, as well as other relevant areas of the contract.[38]

[38] Wilson Direct, pp. 51.

(2) SBC

GT&C Definition Issue 10(a) is whether the term "local interconnection trunk groups" should be included in the ICA. Level 3 contends it should not, even though the term is used throughout various appendices, including the OET, NIM and ITR Appendices, in both agreed and contested provisions (including a provision that Level 3 is advocating). Because this term appears throughout the ICA, it should be defined as SBC proposes.

The issue here is whether the term "local interconnection trunk groups" should be defined as trunk groups used to carry only section 251(b)(5)/IntraLATA traffic, as proposed by SBC. Not all trunk groups within SBC network are designed or intended to carry the same types of traffic. SBC engineers and bills its Local Interconnection Trunk Groups specifically to handle only Section 251(b)(5)/IntraLATA traffic, and such trunk groups should be defined accordingly. This issue goes hand in hand with ITR Issue 11(a), where SBC explained why (consistent with Level 3's current practices) jurisdictionally distinct traffic should be routed on separate trunk groups. SBC's proposed definition of "local interconnection trunk groups" should be adopted for the reasons stated therein.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

The analysis and conclusions in our resolution of Issues DEF-1, DEF-18 and IC-3 apply here as well. Accordingly, the Commission approves the following definition: "'Local Interconnection Trunk Groups' are two-way trunk groups capable of being used to carry Telephone Exchange Service (or Local)/IntraLATA Traffic only." We intend to preclude the interpretation that the relevant trunks have the capability of carrying only certain traffic (although they presumably *will* carry only certain traffic pursuant to rulings we make elsewhere in this Arbitration Decision, particularly in Issues ITR-11 and 12).

11. DEF-11 (Level 3) Should the definition of "Local/IntraLATA Tandem Switch also include a substantive provision that would require Level 3 to build duplicative interconnection trunks?

(SBC)(a) Should the Commission adopt a definition of "Local/ IntraLATA Tandem Switch"?

(SBC)(b) If the answer to (a) is yes, should the definition of "Local/IntraLATA Tandem Switch" reflect that such switches are used for Section 251(b)(5)/IntraLATA Traffic?

a) Parties' Positions and Proposals

(1) Level 3

Again, SBC has improperly embedded traffic distinctions in the definition of Local/IntraLATA Tandem Switch. As explained in Level 3 GTC DEF Issue 9 above, the definition would be acceptable to Level 3 if the caveat at the end of the definition, "*for Section 251(b)(5)/IntraLATA Traffic*," was removed. On a technical level, Tandem switches can handle any type of traffic. Therefore, references to specific traffic types do not belong in the definition, especially when those traffic types are based upon SBC's own self-serving interpretations of the law and not a rule or order. Yet again, a troubling problem is SBC's exclusion of ISP-bound traffic, which is included in other switch definitions. The dispute over ISP-bound traffic belongs in other sections of the Agreement, not in the definition of switching.[39] The Commission should reject SBC's attempt to have Level 3 build duplicative facilities to handle different types of traffic, especially since tandem switches can handle all types of traffic.

(2) SBC

GT&C Definition Issue 11(a) is whether the term "local/IntraLATA tandem switch" should be included in the ICA. Level 3 contends it should not. Because this term appears in the ICA, however, it should be defined as SBC proposes.

SBC's network architecture includes tandems that have been provisioned to handle specific types of traffic. One of these types of tandems is a Local/IntraLATA Tandem Switch. This tandem is provisioned to handle Section 251(b)(5) traffic, ISP-bound traffic, and IntraLATA traffic. The ICA should define the term accordingly.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

The analysis and conclusions in our resolution of Issue DEF-1, above, apply here as well. As we stated there, and for the same reasons, the words "capable of being" should be inserted after the second "is." Again, our purpose is to preclude the interpretation that the subject switch is inherently limited to specific traffic (although the switch presumably *will be used* for specific traffic, pursuant to rulings we make elsewhere in this Arbitration Decision, particularly in Issues ITR-11 and 12). Also, for the reasons included in our resolution of Issues DEF-18 and IC-3, below, the term "251(b)(5) Traffic" should be replaced with either "Telephone Exchange Service Traffic" or "Local Traffic."

---

[39] Wilson Direct, p. 52.

12. DEF-12 (Level 3) Should the definition of "Local only Tandem Switch" also include a substantive provision that would require Level 3 to build duplicative interconnection trunks?

(SBC)(a) Should the Commission adopt a definition of "Local Only Tandem Switch"?

(SBC)(b) If the answer to a (a) is yes, should the definition of "Local Only Tandem Switch" reflect that such switches are used for Section 251(b)(5) and ISP-Bound Traffic?

a) Parties' Positions and Proposals

(1) Level 3

This issue is virtually identical to the disputes in GTC DEF Issues 9 and 11. Further, a Local Only Tandem Switch can switch toll traffic in either direction without modification if access billing is done using Percent Local Use ("PLU"), as discussed in IC Issues Introduction. Although the resolution of the IC Issues will determine the definition of Local Only Tandem Switch, traffic types should be removed from this definition.[40] The Commission should reject SBC's unreasonable and inefficient attempt to have Level 3 build duplicative facilities to handle different types of traffic.

(2) SBC

GT&C Definition Issues 12(a) is whether the term "local only tandem switch" should be included in the ICA. Level 3 contends it should not, even though this term is used throughout various appendices, including the OET and ITR Appendices, in both agreed and contested provisions, and even though Level 3 has agreed to route only local traffic to local-only tandem switches. But because the term appears throughout the ICA and because of Level 3's agreement relating to local-only tandems, the term should be defined in the manner proposed by SBC.

SBC's network architecture includes tandems that have been provisioned to handle specific types of traffic. One of these types of tandems is a Local Only Tandem Switch. This tandem is provisioned to handle only Section 251(b)(5) traffic and ISP-bound traffic, it does not handle IntraLATA or InterLATA IXC carried traffic. The term should be defined accordingly.

(3) Staff

Staff takes no position on this issue.

[40] Wilson Direct, p. 53.

b) Analysis and Conclusions

The analysis and conclusions in our resolution of Issue DEF-1, above, apply here as well. As we stated there, and for the same reasons, the words "capable of being" should be inserted after the second "is." Again, our purpose is to preclude the interpretation that the subject switch is inherently limited to specific traffic (although the switch presumably will be used for specific traffic, pursuant to rulings we make elsewhere in this Arbitration Decision, particularly in Issues ITR-11 and 12). Also, for the reasons included in our resolution of Issues DEF-18 and IC-3, below, the term "251(b)(5) Traffic" should be replaced with either "Telephone Exchange Traffic" or "Local Traffic.

13. ."DEF-13 (Level 3) Should the definition of "Local only Trunk Groups" also include a substantive provision that would require Level 3 to build duplicative interconnection trunks?

(SBC) Should the definition of "Local Only Trunk Groups" reflect that such trunk groups are used for Section 251(b)(5) Traffic only?

a) Parties' Positions and Proposals

(1) Level 3

Once more, SBC's definition limits local trunk groups to a subset of traffic types, "*Section 251(b)(5)*" traffic. This is an unreasonable restriction on the types of traffic that can be carried over local trunk groups and is not even accurate with respect to the types of traffic that are carried over these trunk groups today. For instance, SBC has excluded ISP-bound traffic from this definition, although the network today carries high volumes of ISP-bound traffic on these trunk groups in the form of dial up Internet service. It would be unreasonable and even impossible for SBC to restrict local trunks in the manner suggested by this definition. The more accurate definition would be "*Local Only Trunk Groups are two-way trunk groups used to carry all forms of PSTN traffic within a LATA*."[41] The Commission should reject SBC's unreasonable and inefficient attempt to have Level 3 build duplicative facilities to handle different types of traffic.

(2) SBC

Level 3 proposes to define Local Only Trunk Groups as "two-way trunk groups that carry Section 251(b)(5) Telecommunications Services Traffic only." SBC proposes to define Local Only Trunk Groups as "two-way trunk groups that carry Section 251(b)(5) Traffic only." SBC's proposed language should be adopted because the term "Telecommunications Services" used in Level 3's proposed definition is very broad and

[41] Wilson Direct, pp. 53-54.

could be interpreted as allowing non-Section 251(b)(5) Traffic to be improperly commingled with Section 251(b)(5) Traffic over Local Only Trunk Groups. Commingling the two different types of traffic over the same trunk group would lead to improper billing of the non-Section 251(b)(5) traffic and is improper for the reasons explained in ITR Issue 11(a) above.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

The analysis and conclusions in our resolution of Issues DEF-1, DEF-18 and IC-3 apply here as well. Accordingly, the Commission approves the following definition: "'Local Only Trunk Groups' are two-way trunk groups capable of being used to carry Telephone Exchange Service (or Local)/IntraLATA Traffic only." We intend to preclude the interpretation that the relevant trunks have the capability of carrying only certain traffic (although they presumably *will* carry only certain traffic pursuant to rulings we make elsewhere in this Arbitration Decision, particularly in Issues ITR-11 and 12).

14. DEF-14 (Level 3) Should the definition of "Local Tandem" also include a substantive provision that would require Level 3 to build duplicative interconnection trunks?

(SBC)(a) Should the Commission adopt a definition of "Local Tandem"?

(SBC)(b) If the answer to (a) is yes, should the definition of "Local Tandem" include any Local Only, Local/IntraLATA, Local/Access or Access Tandem Switch, as defined, serving a particular LCA?

a) Parties' Positions and Proposals

(1) Level 3

SBC's definition, "*any Local Only, Local/IntraLATA, Local/Access or Access Tandem Switch serving a particular LCA (defined below)*[42]," includes all of the disputed switch definitions that are addressed in the proceeding GTC DEF Issues above. The best solution for all of the issues surrounding the various definitions of tandem switches would be to replace all tandem switch definitions with the term "Tandem Switch" and give it the following definition:

[42] *Sic*. The parenthetical should say, "(defined above)" since all of the switch types included are alphabetically before this switch type.

> "Tandem Switch" is defined as a switching machine within the public switched telecommunications network that is used to connect and switch trunk circuits between and among other central office switches.

This definition is the only definition necessary to cover all the types of tandem switches listed by SBC, and would resolve the disputes regarding traffic types that are better dealt with in other sections of the Interconnection Agreement.[43] As such, the Commission should resolve all of the disputes regarding the various tandem types in the GTC Definitions Sections by replacing all of the different tandem switch definitions with the above provided definition, as proposed by Level 3.

(2) SBC

GT&C Definition Issues 14(a) involves whether the term "local tandem" should be included in the ICA. Level 3 contends it should not, even though the term is used throughout various appendices, including the NIM, IC, and ITR Appendices, in both agreed and contested provisions. Because this term appears throughout the ICA, it should be defined as proposed by SBC.

SBC's network architecture includes tandems that have been provisioned to handle specific types of traffic. Among these types of tandems are Local Only, Local/IntraLATA, and Local/Access Tandems. Each of these tandems is provisioned to handle Section 251(b)(5) and ISP-bound traffic. SBC's proposed definition of the term "Local Tandem" is used to easily combine all three of these tandem types into a term that can be easily used throughout the contract.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

Since the Commission has modified the contested definitions involved in Issues DEF-1, 9, 11 and 12, we will approve SBC's proposed definition of "Local Tandem" as is. It merely refers to the described switches, with their now-modified definitions, collectively.

[43] Wilson Direct, pp. 54-55.

15. DEF-15 Should "Network Interconnection Methods" be limited to the specific methods set forth in the parties' Agreement and those mutually agreed to by the parties, or should the definition include other methods recognized by Applicable Law, as defined?

a) Parties' Positions and Proposals

(1) Level 3

Level 3 proposes a definition that would cover new interconnection methods that may become available in the future under Applicable Law. Failure to specify the existence of "Applicable Law" will result in a possible waiver of both Parties' rights pursuant to those proceedings. It makes no sense to require the Parties to return to arbitration to take advantage of new interconnection methods when they become available. Such a determination would be a drain on the resources of both Parties and the Commission, which will be forced to address any potential arbitrations stemming from these disputes. The reasonable approach, as Level 3 suggests, is to add the text, "*or according to Applicable Law*," to the Agreement as Level 3 proposes, thus eliminating expensive and time-consuming future arbitrations.[44]

Level 3's language incorporates and acknowledges the existence of such events, and clarifies that the Parties are obligated to incorporate any methods of interconnection captured in such modifications. Level 3 does not want the Parties to waive by default their ability to incorporate such changes into this Agreement and to operate pursuant to such new methods.

Therefore, the Commission should adopt Level 3's language which will protect the parties' abilities to benefit from new interconnection methods.

(2) SBC

Level 3 proposes language in NIM section 1.1 that would define "Network Interconnection Methods" to include not only those methods agreed to by the parties and specified in the ICA, but also any method "according to Applicable Law." Level 3's proposed incorporation of unspecified "Applicable Law" is vague, and could result in needless and time-consuming disputes between the parties. The entire purpose of the definition section is to provide clarity and Level 3's proposed language is anything but clear. Moreover, the Intervening Law provision in the agreement is intended to allow the parties to amend their contract to conform with the law as it evolves. Therefore, Level 3's incorporation of "Applicable Law" should be rejected.

[44] Wilson Direct, p. 55.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

The Commission agrees with SBC that the term "applicable law" is vague, likely to engender needless disputes and ill-suited to an ICA[45]. If "applicable law" is currently in effect, its requirements should be incorporated now into the ICA's original apportionment of rights and responsibilities, not alluded to generically and without an implementation scheme. If "applicable law" emerges after the ICA takes effect, it should (to the extent required by the relevant legislature, agency or court) be specifically and expressly incorporated through the mutual negotiation contemplated by the ICA's change-of-law provisions. Moreover, the term "applicable law" is superfluous. The carriers' conduct will be governed by applicable law in any case, whether or not that law is referenced generically, as Level 3 proposes, or incorporated into the ICA through change-of-law processes.

16. DEF-16 Should the definition of "Out of Exchange LEC" include a reference to a successor-in-interest to SBC?

a) Parties' Positions and Proposals

(1) Level 3

As discussed herein, Out of Exchange is a term invented by SBC. This term cannot be found in Newton's Telecom Dictionary nor in Telecordia "Notes on the Networks", two standard industry publications. Moreover, a Google search on the phrase "Out of Exchange LEC" reveals just 25 entries out of billions of documents on the Internet.[46] All 25 documents are related to SBC contracts. The term and definition are misleading, as one would assume that a LEC who is out of the exchange is not in the exchange. However, SBC's definition actually refers to a CLEC that is in the exchange but has customers outside the exchange. This implies that there is something wrong with a CLEC with coverage in both SBC territory and another adjoining territory. It is normal for a CLEC to provide service in geographic areas that do not follow traditional ILEC and ICO service areas.

In the alternative, Level 3 proposes to define the OET obligation according to Section 251(h) of the Act which would require that OET obligations survive sale of an exchange because they apply regardless of whether ownership of an exchange changes.

---

[45] The Commission notes that the term "applicable law" appears elsewhere in the agreed text of the ICA, without objection from SBC. *E.g.*, GTC Sec. 7.2.4.

[46] Wilson Direct, p. 55-56.

SBC's term is a confusing SBC fabrication, and should be stricken from the Agreement. Alternatively, the Commission should accept Level 3's definition of OET since it tracks the requirements Section 251(h) of the Act.

(2) SBC

This issue is closely tied to the Out of Exchange Issues discussed in Section VI below and should be resolved in the context of those issues.

The disagreement relating to the definition of "Out of Exchange LEC" or "OE-LEC" boils down to a dispute about whether the definition should include a reference to a "successor-in-interest" to SBC Illinois. The definition should not contain any such reference. Under Level 3's language, if SBC Illinois sold off part of its ILEC service territory (e.g., it sold the Lebanon exchange to MCI), the SBC ILEC service area would nevertheless continue to be defined to include the Lebanon service area. That is nonsensical. The OET Appendix is intended to apply when Level 3 is providing service in another incumbent LEC's service territory but is exchanging traffic with SBC. If SBC Illinois is no longer the ILEC in Lebanon, it does not have obligations as an ILEC (which are those set forth in Section 251(c)) for that area.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

Level 3's proposed textual additions are not approved. If SBC exits an "area," within the meaning of subsection 251(h)(1) of the Federal Act, it ceases to be the ILEC in that area. In such case, SBC's "successor in interest" would become the ILEC in that area, by operation of subsection 251(h)(1)(B)(ii). Level 3 and that successor ILEC could either voluntarily and mutually adopt the then-existing Level 3/SBC ICA or negotiate their own.

Moreover, in view of our resolution of Issue OET-2, below, which rejects almost all of SBC's proposed OET Appendix, while approving language stating that SBC has no ILEC duties outside its own service territory, it is not clear that a definition of "Out of Exchange LEC" in the ICA is warranted. Nevertheless, the Commission leaves it to the parties to determine whether to include such a definition.

17. DEF-17(a) Should the definition of "Out of Exchange Traffic" include all Telecommunications Traffic, as defined, or be limited to "Section 251(b)(5) traffic" and "ISP-bound traffic," as defined?

(b) Should the definition of "out of Exchange Traffic" include IP-Enabled Services?

(c) Should the definition of "Out of Exchange Traffic" include Transit Traffic?

a) Parties' Positions and Proposals

(1) Level 3

First, similar to the term "Out of Exchange LEC" discussed in GTC DEF-16 above, the confusing term "Out of Exchange Traffic" has no place in the Agreement. Moreover, SBC's definition excludes some types of traffic from the definition that should be included as part of interconnection. In addition, Level 3 believes that the Agreement should not make any reference to SBC's newly-crafted term "Section 251(b)(5) Traffic", as that phrase is not defined in any FCC order or regulation. Level 3's use of the term "Telecommunications Traffic" is defined in the Act, and should be incorporated into the Agreement.

Second, Level 3 also believes that the Agreement should include reference to "IP-Enabled Traffic". From a practical perspective, SBC's language will result in Level 3 being blocked from exchanging this form of traffic with SBC. SBC has a duty under Section 251 to exchange all forms of traffic with telecommunications carriers, not just selective forms of traffic with certain carriers.

Finally, the definition should also include reference to Transit Traffic. Section 251 mandates that SBC interconnect its network to all other telecommunications carriers, either directly or indirectly. Level 3 believes that includes the exchange of Transit Traffic. Level 3's language in this definition clarifies, consistent with Level 3's position in the ITR Issues section above, that SBC will exchange Transit Traffic that falls under the Out of Exchange Traffic definition.

Therefore, the Commission should reject the inclusion of SBC's terms "Out of Exchange LEC" and "Section 251(b)(5) Traffic", but instead recommends inclusion of "Transit Traffic" and "IP-Enabled Traffic" in the definition of "Out of Exchange Traffic."

(2) SBC

Appendix Out of Exchange Traffic ("OET") is an additional provision of the underlying Agreement, which contemplates the exchange of traffic between SBC and Level 3 that originates or terminates in regions that are not within SBC's incumbent LEC territory. The parties disagree regarding the proper definition of the term "Out of Exchange Traffic," and disagree regarding the proper traffic classifications that should be used.

SBC's position is that while the out of exchange traffic addressed by Appendix OET is different than the traffic addressed by the Appendix Intercarrier Compensation ("IC"), the traffic types are the same, and should be defined the same throughout the entire agreement and its related appendices. Thus, traffic should be classified as Section 251(b)(5) Traffic, and the Commission should reject Level 3's vague

"Telecommunications Traffic" and "IP-Enabled Traffic" nomenclature, for all the reasons discussed under IC Issues 2 and 3. Moreover, Level 3's proposal to include "transit traffic" in the definition of Out of Exchange traffic should be rejected, because transit traffic should not be included as a form of traffic anywhere within the parties' agreement, for the reasons discussed under IC Issue 10.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

In view of our resolution of Issue OET-2, below, which rejects almost all of SBC's proposed OET Appendix, while approving language stating that SBC has no ILEC duties outside its own service territory, it is not clear that a definition of "Out of Exchange Traffic" in the ICA serves a useful purpose. Nevertheless, the Commission leaves it to the parties to determine whether to include such a definition. However, for reasons stated elsewhere in this Arbitration Decision, any such definition must: 1) replace "Section 251(b)(5) Traffic" with "Telephone Exchange Service Traffic" or "Local Traffic;" omit "Telecommunications Services" and "IP-Enabled Services;" and 3) include "Transit Traffic."

18. DEF-18 (a) Should the Commission adopt a definition of "Section 251(b)(5) Traffic"?

(b) If the answer to (a) is yes, should "Section 251(b)(5) Traffic" be limited to certain physical locations of the originating and terminating end users?

a) Parties' Positions and Proposals

(1) Level 3

Throughout this Agreement, SBC has attempted to argue in favor of including its self-serving definition of "Section 251(b)(5) Traffic" in the Interconnection Agreement. Level 3 believes that it is unreasonable and misleading to include SBC'S term, which will in all likelihood lead to further needless litigation. Importantly, the proposed term is not defined in any FCC order or regulation. Rather, it is SBC's interpretation of the Act and FCC actions, to which Level 3 neither agrees nor accepts in the Agreement. The Commission should find that it is improper to include a definition of "Section 252(b)(5) Traffic" and thus forego adopting it in the Interconnection Agreement.

(2) SBC

This issue concerns SBC's proposed use of the term "Section 251(b)(5) Traffic" for reciprocal compensation purposes, and SBC's proposal to rate section 251(b)(5)

traffic by the physical location of end users (as opposed to NPA-NXXs). SBC discusses this issue fully in IC Issue 3.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

The Commission does not agree with SBC that the parties' ICA should contain a definition of "Section 251(b)(5) traffic." SBC's apparent intention is to establish a traffic category that is ostensibly required by law and - pursuant to that law – is limited to a particular geography (the local or expanded local calling area). However, subsection 251(b)(5) of the Federal Act simply establishes the duty of all local exchange carriers to create reciprocal compensation arrangements for "telecommunications." Thus, on its face, "Section 251(b)(5) traffic" is merely telecommunications traffic subject to reciprocal compensation arrangements. But nothing in the text of the statutory subsection identifies the "telecommunications" that will be subject to such arrangements[47]. The text of subsection 251(b)(5) simply does not limit reciprocally compensable traffic to a particular geography.

SBC argues, however, that the FCC coined the phrase "Section 251(b)(5) traffic," implicitly defined it, and imposed a geographic limit on it, in the ISP Compensation Order[48]. None of these assertions is correct, however. Although the words "Section 251(b)(5) traffic" certainly appear in the ISP Compensation Order, the Commission does not find that the FCC was coining a new term of art[49], crafting a regulatory definition or attempting to identify all of the "telecommunications" that should be subject to reciprocal compensation arrangements. Nor was the FCC saying that ISP-bound traffic *is* "Section 252(b)(5) traffic." Rather, the FCC said only that the same reciprocal compensation rates associated with traffic subject to Section 251(b)(5) - whatever that traffic may be - would also apply to ISP-bound traffic. Moreover, throughout the ISP Compensation Order, the FCC treated ISP-bound traffic as *interstate* traffic, thereby precluding the conclusion that ISP-bound traffic originates and terminates in the same local calling area. Thus, if ISP-bound traffic *is* Section 251(b)(5) traffic, then such traffic need not begin and end locally.

---

[47] Nor does the definition of "telecommunications" in the Federal Act: "The term 'telecommunications' means the transmission between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 USC 153(43).

[48] A.k.a., the ISP Remand Order, *supra*.

[49] Indeed, we believe that what began as "traffic subject to section 251(b)(5)" in ¶89 of the ISP Compensation Order became "section 251(b)(5) traffic" later in that same paragraph as a mere drafting convenience.

On the other hand, if ISP-bound traffic is *not* Section 251(b)(5) traffic - but is, as we conclude, subject to the same rates as Section 251(b)(5) traffic - then we are left with the question of whether to attempt an all-inclusive (and all-else-exclusive) definition of "Section 251(b)(5) Traffic," as SBC wants, or to define the traffic that begins and ends within a local or expanded local calling area, which both parties agree is subject to subsection 251(b)(5) reciprocal compensation. We perceive no benefit in defining "Section 251(b)(5) traffic," which is essentially a disputed SBC legal conclusion aimed at excluding FX and FX-like traffic. Instead, we direct the parties to include either "Telephone Exchange Service," which is defined by the Federal Act[50], or the familiar designation "local traffic." This direction is consistent with, and shares the underlying principles of, our resolution of Issue IC-1, below.

19. DEF-19 (Level 3) Whether SBC should be permitted to inflate definition (sic) with language that is and should remain in its tariffs.

(SBC) Should the definition of "Switched Access Service" describe the means by which a two-point communications path between a customer's premises and an end user's premises is established or simply reference a tariff?

a) Parties' Positions and Proposals

(1) Level 3

Switched Access refers to the connection between a phone and a long distance carrier's point of presence ("POP") when a customer makes a call over regular phone lines. Newton's Telecom Dictionary, 15th Ed. SBC's proposed language is derived directly from its Switched Access Tariff, which governs services to which Level 3 is not purchasing. As discussed in the Intercarrier Compensation issues, Level 3's IP-Enabled Services are not circuit switched services. Rather, they are information services, to which access charges cannot apply. Thus, reference in this agreement to SBC's Switched Access Services Tariff is unnecessary and burdens the Agreement with superfluous tariff language. Level 3's proposed language is consistent with industry standards, and the more reasonable approach for the Commission to adopt.

[50] "Telephone Exchange Service" means "(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combinations thereof) by which a subscriber can originate and terminate a telecommunications service." 47 USC 153(47).

(2) SBC

SBC and Level 3 disagree regarding the definition of switched access service. SBC proposes using the definition as written in SBC's federal tariffs (SBC's Tariff FCC No. 2). Rather than rewriting the definition that has been in these tariffs for many years, it is more appropriate and less confusing to use the existing tariff definition, because it provides a high level explanation of the associated interstate and intrastate switched access charges that apply under SBC's federal tariffs and state access tariffs.

In contrast, Level 3 proposes to define switched access as "an offering of facilities for the purpose of the origination or termination from or to Exchange Service customer in a given area pursuant to a Switched Access tariff." That proposal is unclear and would result in disputes between the parties because it omits the following SBC proposed language "the ability to originate calls from an end user's premises to a customer's premises, and to terminate calls from a customer's premises to an end user's premises."

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

The Commission is baffled by the presentation of a definition of "Switched Access Service" here and the inclusion of a definition of "Switched Access Traffic" in Issue ITR-18. The definitions are very different. Since the latter pertains to "this Agreement," rather than to the ITR Appendix in particular, the presence of two definitions for virtually identical terms introduces uncertainty to the parties' ICA. Insofar as the GTC Definitions Appendix is intended for terms that apply throughout the ICA, we will resolve the dispute here. For reasons stated in our resolution of ITR-18, and because of the confusion associated with potentially overlapping definitions, we will reject much of the definition proposed under ITR-18.

Level 3's proposed definition departs markedly from the corresponding definitions in its tariffs in several states. SBC Cross-Ex. 3.1. In contrast, SBC's definition mirrors its federal tariffs. SBC's definition is more specific and, for that reason, more likely to clearly delineate Switched Access Service from other services, thereby precluding future disputes. The Commission recognizes that Level 3's proposed text appears in the parties' present ICA, Level 3 Init. Br. at 188, but that does not make it better than SBC's proposal, which we view as an improvement. On the other hand, the presence of a definition of Switched Access Services in the present ICA undermines Level 3's objection that it does not purchase such services. Moreover, an ICA need not be limited to services the CLEC is presently obtaining, since a purpose of an ICA is to accommodate future activity.

20. DEF-20 Resolved by the parties.

21. DEF-21 (Level 3)(a) In light of the fact that the FCC recognizes that ISP bound traffic should not be rated with regard to geography, should the Commission adopt a definition for federal information access traffic that specifically relies upon the geographic locations contained in and defined by state-approved local exchange tariffs?

(Level 3)(b) Should the definition of Virtual NXX be based upon the NPA-NXX of the calling parties?

(SBC)(a) Should Virtual Foreign Exchange Traffic, Virtual NXX Traffic and FX-Type Traffic be defined as traffic delivered to telephone numbers that are rated as local but routed outside of that mandatory local calling area?

(SBC)(b) Should "FX Telephone Numbers" be defined as telephone numbers with different rating and routing points relative to a given mandatory local calling area?

a) Parties' Positions and Proposals

(1) Level 3

As explained in the section related to IC Issue 5, the ISP Remand Order states that the call need not terminate in the local calling area in order to be deemed an ISP-Bound call. In Section 7.2 of the IC Appendix, SBC attempts to impose either access charges or bill and keep on FX or FX-like traffic based on SBC's belief that the determining factor in calculating intercarrier compensation is the physical locale of the calling parties. As explained, that issue has never been a determining factor in rating a call. Rather, industry standards call for the rating of a call to be based upon the NPA-NXX of the calling parties. In light of the fact that SBC is attempting to impose a compensation regime that is not consistent with the industry standards and the ISP Remand Order holdings, the Commission must reject SBC's language in IC Appendix Section 7.2 and 14.1.

(2) SBC

This issue concerns the parties' competing definitions of "FX" traffic. SBC's proposed definition of Virtual FX and FX-type Traffic accurately describes the call flow between the parties that constitutes FX service. SBC also proposes to distinguish Virtual FX and FX-type Traffic from "Dedicated FX Service." In a "Dedicated FX" arrangement, an end-user receives service from a central office outside the end user's mandatory local calling area, while in a "Virtual FX" arrangement the end user is served via use of a "virtual" NXX (a number associated with a rate center in which the customer has no physical location). Finally, SBC defines "FX Telephone Numbers" as those

numbers "with different rating and routing points relative to a given mandatory local calling area."

Level 3's proposed definition inappropriately fails to distinguish between Dedicated and Virtual FX services. Level 3 also excludes any reference to the Commission-prescribed mandatory local calling areas. As explained under IC Issue 3, however, such local calling areas are fundamental in order to define the jurisdiction and rating of a call, and to determine the appropriate intercarrier compensation.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

SBC's proposed definitions for "Virtual Foreign Exchange Traffic" and "FX-type Traffic" contain more precise detail than Level 3's definition of "Virtual NXX Traffic" and, for that reason, should be adopted. SBC's proposed definition does not appear to confer advantage on any party.

Level 3 does not present a definition of "FX Telephone Numbers" and does not address "second dial tone" FX calling. SBC's definition is approved.

C. Network Interconnection Methods ("NIM")

1. NIM-1 Resolved by the parties.

2. NIM-2 Resolved by the parties.

3. NIM-3 Resolved by the parties.

4. NIM-4 Resolved by the parties.

5. NIM-5 Should the Interconnection Agreement govern the network architecture and exchange of all traffic between the parties, or just local traffic?

a) Parties' Positions and Proposals

(1) Level 3

Both Parties agree that it is technically feasible for Level 3 to exchange all forms of traffic with SBC at a single POI within each LATA where Level 3 interconnects.[51] In

[51] The parties have settled NIM issues 2, 3, and 4, which related to where Level 3 establishes POIs within SBC territories. According to that agreement, whenever traffic between Level 3 and an SBC end office or tandem reaches 24 DS-1s for 3 consecutive months, Level 3 will establish direct trunk groups to such end

fact, SBC does not argue that it is technically incapable of exchanging traffic at a single POI. Rather, SBC explicitly acknowledges that Level 3 can select a single POI - but instead SBC argues that such interconnection is costly.[52] As such, the Commission should reject SBC's proposed limitation on the types of traffic to be exchanged between the parties, and adopt Level 3's language in NIM Appendix Section 2.5 that makes clear that the trunk groups do not limit the exchange of traffic to just local traffic.

(2) SBC

The disputed language for NIM Issue 5, with SBC's proposed language in bold italic and Level 3's proposed language in bold underline, is:

> Each Party is responsible for the appropriate sizing, operation, and maintenance of the transport facility to the POI(s). The parties agree to provide sufficient facilities for the ***Local Interconnection Trunk Groups*** **trunk groups** required for the exchange of traffic between [Level 3 and SBC].

By using the broad term "trunk groups," instead of "local interconnection trunk groups," Level 3's proposed language could be interpreted as requiring SBC to be financially responsible for facilities that carry all types of trunk groups – including, for example, OS-DA, BLVI, 911, mass calling, and Meet Point trunk groups. However, in section 2.7 of the NIM Appendix to the interconnection agreement (the language of which is set forth below in the discussion of NIM Issue 6), the parties already have agreed that Level 3 (not SBC) is financially responsible for facilities over which the OS-DA, BLVI, and 911 trunk groups that carry Level 3-originated traffic ride. Moreover, to the extent Level 3's proposed language is intended to require SBC to be responsible for facilities that carry mass calling trunks for mass calls originated by Level 3 customers and Meet Point trunk groups that carry interLATA traffic originated by or terminated to Level 3 customers to and from interexchange carriers ("IXC's"), that language should be rejected for the reasons discussed by SBC in NIM Issue 6.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

SBC declares that this is really a dispute about financial responsibility for interconnection facilities and chides Level 3 for perceiving it as "just another

---

office or tandem. SBC found this arrangement desirable in part because it keeps traffic off of their tandems and frees up tandem ports and switching functionality.

[52] Albright Direct, pp. 24-26; *See also, Id.*, at12 (stating "the issue is *not* whether Level 3 can interconnect at a single POI or whether Level 3 can select the location of the POI").

manifestation of the parties' disagreement over the type of traffic that can be carried over local interconnection trunks." SBC Rep. Br. at 100. However, the Commission finds that SBC's proposed Section 2.5 permits - or, at the least, does not exclude - Level 3's interpretation. Furthermore, Section 2.7 appears to convey the meaning SBC ascribes to Section 2.5, thereby giving credence to Level 3's apprehension that 2.7 addresses something other than financial responsibility.

Consequently, we will revise Section 2.5 to conform it to SBC's stated purpose in its Reply Brief. Specifically, we delete both "Local Interconnection Trunk Groups" and "trunk groups," so that the second sentence of 2.5 will read as follows: "The parties agree to provide sufficient facilities for the exchange of traffic between [Level 3 and SBC]."

6. NIM-6- Resolved by the parties.

7. NIM-7 (Level 3) Should the agreement contain language that will allow Level 3 to interconnect according to not only the physical Collocation Appendix and tariffs, but also to "Applicable Law," as defined in the Agreement to include statutory modifications and agency for court orders?

(SBC) Should the Agreement, in addition to allowing Level 3 to interconnect pursuant to the Physical Collocation Appendix and to the applicable state tariff, also allow Level 3 to interconnect pursuant to unspecified applicable law?

a) Parties' Positions and Proposals

(1) Level 3

Level 3 notes that this issue is largely addressed in PC Issue 1 and VC Issue 1. For the reasons detailed therein, SBC's refusal to include the reference to "Applicable Law" could serve as a waiver of Level 3's rights to collocate in a new manner if allowed under the Act, FCC orders and regulations, as well as any independent rights pursuant to state law and SBC's own tariffs (i.e., the "Applicable Law"). Each source of additional law is subject to revisions outside the scope of the interconnection agreement process, and Level 3 should not be precluded from taking advantage of these rights. There is no harm in incorporating a reference to Applicable Law. Level 3 should be entitled to purchase services at rates, terms and conditions that SBC may publicly offer to any other carrier. As such, Level 3's language in NIM Appendix Sections 3.1.1 and 3.2.1 is consistent with these goals and should be adopted by the Commission.

(2) SBC

The dispute over NIM Issue 7 concerns the following language (in bold underline) proposed by Level 3:

> Level 3 may Interconnect using the provisions of Physical Collocation as set forth in Appendix Physical Collocation, applicable state tariff **or according to Applicable Law.**

Level 3's proposed insert should be rejected because it is unnecessary and confusing.

The purpose of the parties' interconnection agreement is to set forth as precisely as possible the parties' rights and obligations with respect to the matters that are subject to section 251 of the 1996 Act. To the extent that there is any pertinent "applicable law," SBC asserts that Level 3 should have brought – and presumably did bring – that law to the Commission's attention in its testimony and advocated its express inclusion in the Agreement. To the extent that Level 3 is concerned that some "applicable law" may come into existence in the future and should be taken into account, SBC asserts that concern is already addressed by the intervening law provision in the Agreement, which will allow Level 3 to incorporate that specific applicable law into the ICA.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

The Commission agrees with SBC that the term "applicable law" is vague, likely to engender needless disputes and ill-suited to an ICA[53]. If "applicable law" is currently in effect, its requirements should be incorporated now into the ICA's original apportionment of rights and responsibilities, not alluded to generically and without an implementation scheme. If "applicable law" emerges after the ICA takes effect, it should (to the extent required by the relevant legislature, agency or court) be specifically and expressly incorporated through the mutual negotiation contemplated by the ICA's change-of-law provisions. Moreover, the term "applicable law" is superfluous. The carriers' conduct will be governed by applicable law in any case, whether or not that law is referenced generically, as Level 3 proposes, or incorporated into the ICA through change-of-law processes.

[53] The Commission notes that the term "applicable law" appears elsewhere in the agreed text of the ICA, without objection from SBC. *E.g.*, GTC Sec. 7.2.4.

8. NIM-8 Resolved by the parties.

D. Interconnection Trunking Requirements ("ITR")

1. ITR-1 (Level 3) Should Level 3 and SBC exchange all types of Telecommunications Traffic over the interconnections trunks?

(SBC) Should the list of types of traffic that will be carried over trunk groups include "Telecommunications Traffic" or "Section 251(b)(5) Traffic, ISP Bound Traffic, IntraLATA toll [and] InterLATA "meet point" traffic?

a) Parties' Positions and Proposals

(1) Level 3

Initially, Level 3 notes that, as a leading facilities-based provider of telecommunications services, it has constructed a nationwide advanced fiber optic backbone network. Over the course of developing its network, where Level 3 interconnects with ILECs like SBC, Level 3 has constructed or paid for expensive co-carrier facilities capable of carrying all forms of traffic (i.e., interLATA, Local and IntraLATA), and SBC and Level 3 both continually cooperate in the proper capacity management for these facilities[54]. As Level 3 witness Mr. Hunt explains, Level 3 and SBC have, consistent with their interconnection agreements and industry standards, exchanged traffic over trunk groups that are not dedicated to a particular type of call, and have done so since the beginning of their exchange of traffic.[55] In other words, Level 3 has built its current network relying on trunks that carry a mix of traffic, basing the size and capacity of its trunking arrangements with SBC on the total amount of traffic exchanged between the parties. Importantly, even SBC witness Albright admits that combined traffic is currently exchanged over the same trunk groups today.[56]

According to Level 3, SBC's proposed use of the phrase "Section 251(b)(5) Traffic, ISP Bound Traffic, IntraLATA toll [and] InterLATA 'meet point' traffic" mischaracterizes the types of traffic that is exchanged between the Parties and is not consistent with the clear language of the Act.

SBC unlawfully restricts the scope of traffic to which Section 251(b)(5) compensation regimes apply. Under the Act, Section 251(b)(5) applies to all telecommunications traffic, irrespective of where the calling and the called parties are physically located. By its very terms, Section 251(b)(5) applies to "the transport and termination of telecommunications."

---

[54] Petition, ¶ 36.

[55] Hunt Direct, p. 44.

[56] Albright Direct, p. 42-43.

To this clear definition, SBC imposes a geographic standard that occurs nowhere within Section 251, nor within any definitions relevant to Section 251 (i.e. neither the definition of "telephone exchange service" "exchange access service" or "telecommunications" contain such restrictions. Ironically, the one term that SBC argues is relevant to its Section 251 obligations "LATA" is defined with some reference to geography, which geographic boundaries are no longer legal barriers to the types of services SBC is permitted to provide). SBC's attempts to single-handedly rewrite sections of Title 47 of the United States Code in a bilateral interconnection negotiation, where delay often serves SBC's purposes is, on its face, entirely inappropriate. Here, SBC's designs are targeted to achieving results in bilateral interconnection negotiations they have failed to achieve in their arguments and appeals of the FCC's deliberations in the ISP Remand Order and the FCC's investigations regarding IP Enabled services.[57] Level 3 proposes that it would be best if the parties and this Commission wait until the FCC has released its orders, which is expected in the very near future. As such, the Commission must reject SBC's attempts at preempting the FCC's deliberations in the upcoming ISP Remand Order, and reject SBC's language in IC Appendix Section 1.2. Rather, Level 3's use of the term "Telecommunications Service" as more consistent with Section 251.

(2) SBC

The disputed language for ITR Issue 1, with SBC's proposed language in bold italic and Level 3's proposed language in bold underline, is:

> The paragraphs below describe the required and optional trunk groups for the exchange of *Section 251(b)(5) Traffic, Telecommunications Traffic, ISP Bound Traffic, IntraLATA toll, InterLATA 'meet point',* mass calling, E011, Operator Services and Directory Assistance traffic.

The ITR Appendix does not (and should not) address all traffic exchanged between the parties, as Level 3's proposed language suggests. For example, the ITR Appendix should not address transit traffic because transit traffic, as discussed elsewhere, is not within the scope of section 251(b) or 251(c). Nor should it include interexchange access traffic, which Level 3 exchanges with SBC in its (Level 3's) capacity as an interexchange carrier ("IXC"). One reason is that Level 3's relationship with SBC, and its rights and obligations vis à vis SBC, where Level 3 is acting in its capacity as an IXC, are governed by access tariffs (state and federal), and not by a section 251/252 interconnection agreement. This is explained fully in the SBC position statement for ITR Issue 11(a). Another reason is that the traffic exchanged between SBC and Level 3 (where Level 3 is acting an as IXC) – interexchange traffic – is not the kind of traffic ("telephone exchange" and "exchange access") for which interconnection

[57] ISP Remand Order.

is required under section 251(c)(2). Local Competition Order, ¶ 191. This is explained fully in SBC's position statement for NIM Issue 1 and ITR Issue 11(a). The purpose of this arbitration – and of the interconnection agreement it will produce – is to implement the requirements of section 251(b) and (c). *See*, 47 U.S.C. § 252(a) (stating that an ILEC has "a duty to negotiate in good faith in accordance with Section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5)" of section 251(b) and (c) of the 1996 Act); 47 U.S.C. § 252(e)(6) (stating that an aggrieved party may bring an action to determine whether the agreement "meets the requirements" of section 251 and 252 of the Act). Because Level 3's proposed language seeks to implement requirements that do not fall within the parameters of section 251(b) and (c), that language should be rejected.

(3) Staff

SBC proposes to prohibit Level 3 from sending interLATA toll traffic over local interconnection trunk groups – a proposal that Level 3 opposes. Appendix ITR, Section 12. Staff Init. Br. at 35, et seq.

Staff notes that the benefits from combining both interLATA toll traffic with other traffic carried on local interconnection trunk groups include reductions in the number of interconnection facilities the companies need to deploy and reductions in the number of tandem ports used. Staff Init. Br. at 35, *et seq*. InterLATA toll traffic is subject to switched access charges, while traffic such as 251(b)(5) traffic is subject to reciprocal compensation rates. 47 U.S.C. §251(b)(5); 47 C.F.R. §§51.701, *et seq*., 69.5. Therefore, the costs of combining such traffic over common local trunk groups include the costs of measuring such traffic and the costs associated with inaccurately measuring and billing such traffic. Staff Init. Br. at 35, *et seq*.

In Staff's view, the benefits, in terms of facilities cost savings, will depend on the size of any reduction in interconnection facilities needed when traffic is combined over common trunk groups. Staff Init. Br. at 35, *et seq*. Tandem switch exhaust will also be dependent on the number of interconnection facilities that are used to exchange traffic. Tr. 244-245. While the parties offer competing theories regarding why reductions *might* occur, they have not come forward with evidence in this proceeding regarding the specific size of such reductions if any. Staff Init. Br. at 35, *et seq*. Level 3's evidence is, in Staff's view, equivocal at best, while SBC's has offered little or no evidence regarding these questions. Staff Init. Br. at 35, *et seq*.

Similarly, there is little evidence tending to quantify the costs associated with incorrectly measuring and billing traffic. Staff Init. Br. at 35, *et seq*. Level 3's evidence is backward-looking, and there is little to no evidence that quantifies the costs of establishing and maintaining a system to accurately measure and bill jurisdictionally diverse traffic passed over common trunk groups. Id.

In sum, the parties have provided little in the way of quantifiable evidence regarding the costs and benefits of passing intraLATA toll traffic over common trunk groups. Staff Init. Br. at 35, *et seq*. There is, however, some limited evidence to

suggest that neither the costs of establishing separate trunk groups, nor the costs of measuring and billing jurisdictionally diverse traffic passed over common trunk groups, is particularly significant. Id. First, SBC contends that Level 3 currently has substantial excess trunk capacity. SBC Ex. 1.1 (Albright) at 8. To the extent that Level 3 in fact has such excess capacity, this is inconsistent with Level 3's arguments regarding the significance of costs that excess capacity causes, both directly - through investment costs, and indirectly - through costs associated with tandem exhaust. Staff Init. Br. at 35, *et seq*. Second, Staff's support for and the Commission's past determinations to accept SBC's proposal to separate intercarrier compensation rating structures relied on SBC's assertions that measurement of such traffic through usage factor proxies was a reasonable exercise. AT&T Arbitration Decision at 124. This suggests then that percentage usage factors can be relied on without imposing excessive costs on the parties, as Level 3 suggests. Staff Init. Br. at 35, *et seq*.

Thus, based upon the available evidence, neither maintaining separate trunk groups for jurisdictionally diverse traffic, nor combining such traffic over common trunk groups, appears to be an unduly burdensome outcome. Thus, the Commission can adopt either party's proposal. Staff Init. Br. at 35, *et seq*. Nevertheless, it is Staff's recommendation that the Commission adopt SBC's proposal, which would require Level 3 to do, what it states it normally would do in any case, and pass interLATA toll traffic over feature group D trunk groups rather than over local interconnection trunk groups. Id.

The Commission has denied, based on an incomplete proposal, at least one other carrier the ability to combine such traffic over common trunks. Staff Ex. 1.0 (Zolnierek) at 18. Level 3 has certainly failed to provide evidence for the Commission to alter that decision here. Staff Init. Br. at 35, *et seq*. In addition, with no evidence that either proposal is unduly burdensome on the parties, SBC's proposal, which will prevent misidentification of traffic, is to be favored. Id. It is for these reasons that the Commission should accept SBC's position on this issue. Id.

Going forward, a more significant issue may be the appropriate routing of IP-public switched telephone network ("PSTN") VoIP traffic. Staff Init. Br. at 35, *et seq*. However, the Commission should not decide this issue, inasmuch as the parties already have taken actions that would require the FCC to decide it and because the FCC has stated "that [it, the FCC], not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to IP-enabled services." FCC News Release, "FCC Finds That Vonage Not Subject To Patchwork of State Regulations Governing Telephone Companies", (November 9, 2004); http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254112A1.doc.

For these reasons Staff recommends the Commission accept SBC's proposed language for Appendix ITR Section 1.2 which would have the effect of limiting the scope of this contract by excluding from the contract rates, terms, and conditions for interLATA toll traffic and IP-PSTN VoIP traffic. Staff Init. Br. at 35, *et seq*.

b) Analysis and Conclusions

As we determine in our resolution of Issues IC-1 and IC-2, below, SBC's proposed term "Section 251(b)(5) Traffic" is disapproved, for the reasons articulated in connection with those issues. Either "Telephone Exchange Service Traffic" or "Local Traffic" should be used instead. Level 3's proposed term "Telecommunications Traffic" is rejected as vague and overbroad; traffic categories that will be transmitted over the parties' interconnection trunks, in addition to those listed by SBC (as modified by us in this paragraph), should be listed specifically. Transit traffic should be included among them, pursuant to our resolution of Issue ITR-2, below. IP-enabled services should not be included, for the reasons stated in our Resolution of Level 3 Issue IC-2(a).

2. ITR-2 (Level 3) Should Level 3 and SBC exchange Transit Traffic over the interconnection trunks?

(SBC) Should local Interconnection Trunk Groups and Meet Point Trunk Groups be limited to the exchange of traffic between the parties' end users?

a) Parties' Positions and Proposals

(1) Level 3

For the purposes of this interconnection agreement, "transit traffic" is traffic that is originated by a third party local service provider (such as an Independent Phone Company ("ICO"), Cellular Mobile Telephone System ("CMTS") or a CLEC (other than Level 3) and is transported over the facilities of SBC for termination by Level 3, or that is originated by Level 3 and is transported over the facilities of SBC for termination by a third party local service provider.[58] While carriers such as Level 3 have direct trunks to certain third party providers, only SBC has ubiquitous interconnection trunks to every third-party provider and exchanges traffic with all third party providers on a regular basis.[59] If a Level 3 customer calls the customer of a CLEC that is not directly interconnected with Level 3, SBC acts as a "hub" and is paid transit rates to carry the traffic between the carriers.[60]

Since the adoption of the Act, SBC has provided transit service pursuant to interconnection arrangements.[61] The existing SBC and Level 3 interconnection

---

[58] Wilson Direct, p. 24; Hunt Direct, p. 51. SBC states in its testimony that transit traffic that runs from Level 3 to a third party provider is not at issue here. *See* McPhee Direct at p. 20. Level 3 does not agree. Level 3's concerns and proposal regarding transit traffic apply regardless of the direction of the traffic.

[59] Hunt Direct, p. 51; Wilson Direct, p. 25.

[60] Hunt Direct, p. 51.

[61] Hunt Direct, p. 51.

agreement provides a rate for the traffic.[62] In addition, the agreement protects SBC by establishing a traffic threshold at which point Level 3 must establish direct interconnection with the third party carrier.[63] However, during negotiations SBC stated that it would no longer carry Level 3's transit traffic under the terms of an interconnection agreement subject to the Act.[64]

SBC asserts that Section 251(c)(2) of the Act does not obligate SBC to provide transit services as a form of interconnection, regardless of SBC's acknowledged requirement to provide direct and indirect interconnection with its network.[65] SBC contends that transit is not an interconnection service because indirect interconnection must entail more than the mere transport of traffic, *i.e.,* there must be an exchange of traffic that originates or terminates on SBC's network.[66] SBC states that it will continue to offer a transit service for carriers, but the terms of the service will be contained in a separate commercial agreement outside the scope of a Section 251/252 negotiations and Commission determinations.[67]

Level 3 argues that SBC has a legal obligation under Section 251 of the Act to provide transit service to Level 3 as an inherent aspect of interconnection. The Commission should follow the lead of the FCC's Wireline Competition Bureau, which expressly directed the parties to include language in the interconnection agreement that includes *in a Section 251 interconnection agreement* that the ILEC must provide transit services to the CLECs.[68] SBC cannot reasonably assert that Section 251 does not require SBC to provide transit services to Level 3. The Bureau has provided this Commission with a roadmap of how to address this issue of Transit Traffic, and the Commission should follow suit.

Furthermore, as SBC admits, Section 251(a) imposes on all telecommunications carriers the duty to interconnect with the facilities and equipment of other telecommunications carriers either "directly or indirectly." Nothing in the language in Section 251(a) limits SBC's obligations under this section to traffic that originates or terminates on SBC's network as SBC suggests.[69] As such, transit service provides meaning to the requirement under Section 251 that SBC interconnect indirectly with other carriers.

---

[62] Hunt Direct, p. 51.

[63] Hunt Direct, p. 51, *citing* Current SBC-Level 3 Interconnection Agreement, Appendix Interconnection Trunking Requirements, Sections 4.2.1, 4.2.2, Appendix Reciprocal Compensation, Section 6.

[64] Hunt Direct, p. 51.

[65] McPhee Direct, p. 22-23.

[66] McPhee Direct, pp. 22-23.

[67] McPhee Direct, pp. 24.

[68] FCC Virginia Arbitration Order, ¶¶ 115-120.

[69] McPhee Direct, p. 22-23.

Section 251(c)(2) states that incumbent LECs have a duty to interconnect with telecommunications providers "for the termination and routing of telephone exchange service and exchange access." Again, nothing in Section 251(c)(2) limits SBC's interconnection duty to the exchange of traffic between SBC and Level 3.[70] Rather, Section 251(c)(2) demands the parties exchange all traffic regardless of origination or termination. The obligation to exchange all traffic, regardless of origination or termination, is fundamental to the transparent, seamless, un-Balkanized network which lies at the core of the goals of the Act. It is the recognition inherent in the Act that artificial barriers to the ubiquitous exchange of traffic – unjustified by either network efficiency or economic necessity – which dictates the continuation of the transit traffic relationship already established between Level 3 and SBC. SBC must continue to provide transit traffic services to Level 3 so that Level 3 – and all carriers - may exchange transit traffic with other third parties that are also connected to SBC.

Alternatively, should SBC's arguments fail to sway the Commission and the Commission includes transit services in the agreement, SBC urges the Commission to adopt its proposed transit language, which introduces a bifurcated rating system for Transit Traffic. SBC proposes the current Transit Traffic Rate for those minutes up to a certain threshold of minutes per month throughout the state, and, for any minutes over that threshold, Level 3 would pay a substantially higher Transit Traffic Rate.

According to SBC, this would not result in a difference in rate until the threshold is met. However, the SBC scheme defies common sense. Generally, when volume increases on a product, network economics would result in a decrease in the price per unit. SBC's proposed bifurcated rating proposal reflects a scheme where the price goes up with the increased volume which directly contravenes basic rules of economics. SBC's ability to increase the price reflects SBC's market power for providing transit services and is not linked to any evidence that shows SBC's costs actually increase.

Counter to SBC's assertions that its proposal would not result in a difference in rate until the threshold is met, SBC's proposals actually result in economically forcing Level 3 to direct connect to other carriers at a threshold far lower than the 24 trunks that is included in the agreed upon terms of the Agreement. The 24 trunk threshold when applied to the SBC bifurcated rate proposal would not have any meaning when the realities of the network operations are taken into account.

For instance, if the Commission were to calculate the number of minutes Level 3's customers in the state are using a phone in any given minute (a calculation resulting in what is referred to as an "ehrlang") to calculate the number of trunks Level 3 would need to connect calls between two switches or two parties, the result would be about 166 ehrlangs on average, utilizing approximately 6 to 10 trunks to reach the given 8 million minute threshold – voiding the remaining 14-18 trunks under the 24 trunk

[70] McPhee Direct, p. 22-23.

threshold.[71] Thus, SBC's proposal forces Level 3 to pay the higher Transit Rate (i.e., on more than 8 million minutes) for traffic on the remaining 14-18 trunks in order to carry traffic that even SBC acknowledges should not require direct connection. This would economically force Level 3, and every other CLEC in the state, to direct connect far more often, raising their costs by orders of magnitude, for no network efficiency reason. Rights of way and poles would literally be crammed and over burdened with wires to effect the SBC scheme- should Level 3 or a CLEC not succumb to SBC's dictated rate structure. In light of these facts, SBC's proposal to institute an arbitrary and unsupportable bifurcated rate structure for Transit Traffic must be rejected. In actuality, SBC's proposal is nothing but a back door attempt to force Level 3 to either pay unjustified rates or direct connect to other carriers at a much lower trunk threshold than would otherwise be required under the terms of the Agreement.

Further, in addition to the FCC Virginia Arbitration Order[72] discussed elsewhere, Level 3 points the Commission to a number of other state commission orders imposing transit traffic terms and conditions within a Section 251/252 interconnection agreement.[73]

In light of the obligations imposed by Section 251 of the Act, the FCC's Virginia Arbitration Order, and the various state commission orders cited herein, the Commission should adopt its rationale on Transit Traffic. With specific application to each of the remaining Transit Traffic issues, Level 3 states as follows:

---

[71] For instance, in any given minute Level 3 has ten of its customers using the network at that time, that minute result in about 10 ehrlangs.

[72] In re Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection, 17 FCC Rcd 27039 (2002)("Virginia Arbitration Order").

[73] Final Arbitrators Report, In the Matter of Verizon California Inc. (U-1002-C) Petition for Arbitration of an Interconnection Agreement with Pac-West Telecomm, Inc. (U5266C) Pursuant to Section 252(b) of the Telecommunications Act of 1996, Application 02-06-024, at 17-18 (2003) ("Verizon California"); In the Matter of the Petition of Michigan Bell Telephone Company, d/b/a SBC Michigan, for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with MCIMetro Access Transmission Services, LLC, Pursuant to Section 252(b) of the Telecommunications Act of 1996, MPSC Case No. U-13758, Opinion and Order, Aug 18, 2003 ("MCIMetro Michigan Arbitration Order"); In the Matter of the Application of AT&T Communications of Michigan, Inc. and TCG Detroit for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with Ameritech Michigan pursuant to 47 USC 252(b), Case No. U-12465, Opinion and Order, Nov 20, 2000; In the Matter of the Application of Sprint Communications Company, L.P. for Arbitration to Establish an Interconnection Agreement with Ameritech Michigan, MPSC Case No. U-11203, Order Approving Arbitration Agreement with Modifications, Jan 15, 1997; Opinion and Order, In the matter of the petition of Michigan Bell Telephone Company d/b/a SBC Michigan for arbitration of interconnection rates, terms, conditions, and related arrangements with MCIMetro Access Termination Services, LLC, pursuant to Section 252b of the Telecommunications Act of 1996, MPSC Case No. U-13758, p. 45-46 (2003); Re MediaOne Telecommunications of Massachusetts, Inc., D.T.E. 99-42/43, D.T.E. 99-52, Massachusetts Dept. of Tele. And Energy, rel. Aug. 25, 1999; see also, Ohio Rules of the Commission RC 4901:1-6-32(C)-(D).

This Commission should follow the FCC's Wireline Competition Bureau's lead in this pivotal issue. The Commission must find that transit terms are appropriate to incorporate into the Agreement. For the reasons stated above, the Commission should adopt Level 3's language in ITR Appendix Section 3.3, and reject SBC's attempt to limit the exchange of traffic to that "traffic between each Party's End Users only."

(2) SBC

Issue 2 is similar to ITR Issue 11(a), and SBC's proposed language should be adopted and Level 3's rejected for the reasons stated therein.

(3) Staff

Staff notes that SBC proposes to exchange traffic with Level 3 over local interconnection groups only when the traffic is exchanged between SBC and Level 3's end users. Appendix ITR, Section 3.3. To Staff, SBC's position appears to be that this language is intended to prevent Level 3 from passing third party IXC traffic over local interconnection trunk groups. Level 3 – SBC 13State – DPL – ITR – Issue No. ITR 2. Level 3 objects to SBC's proposal on the grounds that SBC's proposal would prevent both Level 3 and SBC from transiting traffic. Id.

Staff recommends the Commission reject SBC's proposal to include the phrase "for the exchange of traffic between each Party's End Users only" in the first and second paragraph of Appendix ITR, Section 3.3. Staff Init. Br. at 41, *et seq*. Nothing prohibits Level 3 from providing wholesale local exchange or exchange access services. Id. SBC has proposed restrictions on the use of common trunk groups that would, if accepted - as Staff recommends - prevent Level 3 from passing interLATA toll traffic (whether transited or not) over local interconnection trunks, thereby obviating SBC's asserted concerns in this regard. Id. Adding SBC's additional "end user" restriction is therefore in Staff's view unnecessary to prevent Level 3 from passing interLATA toll traffic (or other prohibited forms of traffic) over local interconnection trunks. Id. Thus, Staff considers SBC's proposed language redundant at best. Id.

More problematic, in Staff's opinion, is the fact that SBC's language might well prevent Level 3 from passing *permissible* traffic -- such as Section 251(b)(5) traffic -- over local interconnection trunks when Level 3 acts as a transiting provider or as a wholesale provider for another retail provider. Staff Init. Br. at 41, *et seq.* In addition, this language appears to preclude the exchange of all meet point traffic, which as Staff understands it, is defined as traffic passed from third party IXC providers. Tr. 646-47. In fact, because Level 3 has no end users, Tr. 150, SBC's proposal appears to require Level 3 to cease exchanging traffic with SBC entirely. Staff Init. Br. at 41, *et seq*. Thus, SBC's proposal should be rejected. Id.

b) Analysis and Conclusions

Level 3 ITR-2. As the FCC's Wireline Competition Bureau ("Bureau") stated in the Virginia Arbitration Order, the FCC "has not had occasion to determine whether

[ILECs] have a duty to provide transit service under this provision of the statute [subsection 251(c)(2) of the Federal Act], nor do we find clear Commission precedent or rules declaring such a duty."[74] This refutes SBC's argument that the FCC's Local Competition Order "foreclosed any contention" that ILEC's interconnection duties under 251(c)(2) include transiting." SBC Init. Br. at 147. Indeed, what the FCC said at paragraph 176 of the Local Competition Order, and in 47 CFR 51.5, is that an ILEC's interconnection obligations under 251(c)(2) do not include "transport and termination" (terms that actually appear in subsection 251(b)(5). The FCC has yet to address whether transit is included within the meaning of "transmission and routing" in subsection 251(c)(2)(A), or within any express or implied duty in 251(b)(5), or within 251(a)(1).

Nevertheless, while the Virginia Arbitration Order rebuts SBC's argument, it does not necessarily sustain Level 3's request that we direct the parties to include transiting in their ICA. As the Bureau said, there is simply no direct FCC pronouncement or rule on this issue. What can be said, though, is that the Virginia Arbitration Order *did* impose transiting duties on Verizon (the involved ILEC), despite Verizon's denial of any duty[75]. The Bureau's underlying rationale apparently embraced the CLEC claim that compliance with the subsection 251(a)(1) obligation to interconnect "indirectly" with other telecommunications carriers would be abridged if ILEC transiting were terminated[76]. The Bureau also emphasized both the "fundamental purpose" of Section 251 to promote interconnection, and the potential for competitive disadvantage to CLECs without ILEC transiting[77]. At the very least, the Virginia Arbitration Order presumes that a transiting obligation is not inconsistent with the Federal Act.

This Commission concurs, and finds support in the subsection 251(a)(1) duty to interconnect indirectly. We assume that, in that subsection, Congress was, first, assuring universal interconnectivity and, second, prohibiting obstruction of that interconnectivity. Thus, if CLECs A and B were directly interconnected, new CLEC C would have a duty to interconnect with each, and neither A nor B could inhibit indirect interconnection with the other. Indeed, by including a duty to interconnect *indirectly*, Congress precluded CLECs A and B from asserting that CLEC C had to *directly* interconnect with each of them.

We further assume that Congress imposed an indirection interconnection duty because it did not, in the case of rural telecommunications companies ("rural telcos")[78], establish a direct interconnection obligation. Before a rural telco can be required to

---

[74] *Id*., ¶117.

[75] Verizon argued that the CLECs were transforming their interconnection *duty* into a transit *right* enforceable against Verizon. *Id*., ¶113

[76] *Id*., ¶118 & ¶108. .

[77] *Id*., ¶118. However, the Bureau cited these factors in the context of disapproving *abrupt* termination of transiting, not in approving transiting itself.

[78] In the Federal Act, Rural Telcos are defined at 47 USC 153(37).

interconnect directly, the pertinent state commission must first determine that an interconnection request is "not unduly burdensome, is technically feasible, and is consistent with" enumerated provisions of the Federal Act[79]. Since the state commission could decline to make the requisite determinations, the carrier seeking interconnection with the rural telco could only accomplish that indirectly. If another carrier (whether CLEC or ILEC) that already had direct interconnection with the rural telco were permitted to deny the request for indirect interconnection with the rural telco, universal interconnectivity would be obstructed. That result, we conclude, is inconsistent with the intention of the Federal Act generally and Section 251 in particular.

The Commission also finds support for a transit obligation, as well as policy guidance, in state law. In Michigan Bell Telephone v. Chappelle, the federal district court held that because "federal law does not preclude mandatory transiting, under the [Federal Act's] savings clause [Section 261(c)], the [Michigan Public Service Commission] is allowed to impose additional pro-competitive requirements *under state law*."[80] In an arbitration shortly after the Federal Act took effect in 1996, however, this Commission had initially said that neither state nor federal law required transiting[81]. But less than a month later, we noted that we had "clearly reserved the issue of whether public policy concerns might cause the Commission to impose transiting as an obligation on an [ILEC] if the parties present it as an unresolved issue in arbitration."[82] Accordingly in that proceeding, we ordered the parties to include a transiting provision in their ICA, citing, specifically, Section 13-702 of the Illinois Act[83], and, generally, the "vital public interest in efficient carrier interconnection at reasonable rates."[84] Moreover, we stated that the absence of transiting would "create inefficiencies, raise costs and erect barriers to competition."[85] Subsequently, the Illinois Public Utilities Act was extensively amended and re-amended. A principal intention of those amendments was to promote telecommunications competition[86].

---

[79] 47 USC 251(f)(1)(A).

[80] 222 F. Supp. 905 (E. Dist. Mich. 2002), at 918; aff'd 93 Fed. Appx. 799, 2004 U.S. App. Lexis 5985 (6th Cir. 2004) (emphasis added).

[81] AT&T/Illinois Bell Telephone Arbitration, Dockets 96-AB-003 & 004, Nov. 26, 1996.

[82] MCI/Illinois Bell Telephone Arbitration, Docket 96-AB-006, Dec. 17, 1996, at 18.

[83] "Every telecommunications carrier operating in this State shall receive, transmit and deliver, without discrimination or delay, the conversations, messages or other transmissions of every other telecommunications carrier with which a…physical connection may have been made." 220 ILCS 5/13-702.

[84] MCI/Illinois Bell Telephone Arbitration, *supra*, at 19.

[85] *Id*.

[86] *E.g.*, 220 ILCS 5/13-801(a) ("The Commission shall require the [ILEC]…to the fullest extent possible to implement the maximum development of competitive telecommunications services offerings"); 220 ILCS 5/13-103(b).

Like the Michigan Public Service Commission (as discussed in Michigan Bell v. Chappelle, *supra*) the North Carolina Utilities Commission has also held that transiting could and should be required in an ICA pursuant to state law[87]. The North Carolina Commission declared that the view of those opposing a transit obligation "would immoderately multiply the number of [ICAs] - and the economic costs relating to entering into them - because the corollary of [their] view is that…everyone must have an [ICA] with everyone else, even if the amount of traffic exchanged is minimal."[88] The North Carolina Commission also asserted that transiting was consistent with federal law. "[T]ransit traffic is not a new thing"…[and] it "strains credulity to believe that Congress, in the [Federal Act] intended, in effect, to impair this ancient practice and make it merely a matter of grace on the part of ILECs, when doing so would inevitably have a tendency to thwart the very purposes that [the Federal Act] was designed to allow and encourage."[89]

This Commission now confirms that ILEC transiting promotes telecommunications competition and efficiency (both economic and technical), that it is an essential element of carrier interconnection under the Illinois PUA, and that a transiting requirement is not inconsistent with the Federal Act[90]. An ILEC is ubiquitous within its service territory[91], while a CLEC will not necessarily have sufficient resources to directly interconnect with every other CLEC in that territory, at least until its traffic to each such CLEC reaches the critical mass that justifies capital investment. Furthermore, neither competition nor customer welfare would be promoted by deploying assets to directly interconnect CLECs that exchange trivial traffic quantities. We further conclude that, to promote competition and efficiency, the terms and conditions governing transiting should be addressed in the parties' ICA with the other terms governing interconnection, unless the parties agree otherwise.[92] The ICA should also assure (as we do elsewhere in this Decision) that the ILEC is properly compensated for transiting (Issue ITR-6), and that there are safeguards against perpetual transiting when sufficient basis arises for installing direct CLEC-to-CLEC interconnection (Issue ITR-5). Such measures will maintain an appropriate balance, so that the systemic benefits of transiting are not diluted.

To be clear, the Commission understands that SBC is not purporting to withhold transiting services, and that it has offered to negotiate a separate transiting agreement

---

[87] In the Matter of Verizon South, Inc. for Declaratory Ruling that Verizon is Not Required to Transit InterLATA EAS Traffic Between Third Party Carriers, N.C. Utilities Comm'n Docket No. P-19, Sub 454, Order Denying Petition at 6-8, Sept. 22, 2003.

[88] *Id*., at 6.

[89] *Id*.

[90] It follows that a transiting obligation is permissible under Sections 252(e)(3), 253(b) and 261(c).

[91] Ironically, SBC's predecessor took the position that *only* an ILEC could provide transiting. Verizon Wireless/Ameritech Arbitration, Docket 01-0007, May 1, 2001, at 33.

[92] That is, we will not preclude separate agreements when the involved carriers *mutually consent* to so segregate their transiting terms. Alternatively, the CLEC can elect to purchase transit services via tariff.

outside of this arbitration. SBC Init. Br. at 144. However, viewed generally, if transiting were shielded from the compulsory powers inherent in arbitration, SBC would bear no obligation to enter into a transiting contract. Moreover, there is no guarantee that the parties will achieve agreement[93] and, as a result, customer service could be delayed (when the CLEC is a new entrant) or disrupted (when, as here, there is already transiting between the parties). We are also aware that SBC has an intrastate transiting tariff. However, many tariffed services are also addressed in ICAs, and when, like Level 3 here, a party seeks to include transiting in the same document as its other interconnection terms, we will evaluate that request.

SBC ITR-2. SBC states that this issue is similar to Issue ITR-11(a) and refers the Commission to its arguments in connection with the latter issue. SBC Init. Br. at 136. Accordingly, our resolution of that sub-issue will apply here as well.

3. ITR-3 - Resolved by the parties.

4. ITR-4 - Resolved by the parties.

5. ITR-5 (Level 3) Should Level 3 establish direct trunk arrangements with other carriers once there is a sufficient volume of traffic exchange between Level 3 and the other carriers?

(SBC) Is a non-Section 251 service - transit service, in this instance - subject to arbitration under 252 of the 1996 Act?

a) Parties' Positions and Proposals

(1) Level 3

Level 3's language in ITR Appendix Section 4.3 allows Level 3 to establish direct trunking with other carriers once the level of traffic reaches a DS1 level of volume on a consistent basis. SBC appears to agree that the DS1 threshold, or 24 DS0 trunks, is the appropriate level. This threshold is also consistent with the FCC Wireline Competition Bureau's findings in the FCC Virginia Arbitration Order, which used a DS1 threshold to determine when the CLEC must direct connect with another carrier.[94]

It appears the only remaining dispute is the amount of time necessary for a determination that the threshold has been met. Under Level 3's ITR Appendix Section 4.3, the practical timeframe is three consecutive months. This will allow for a realistic

---

[93] Indeed, the CLEC will have scant leverage in such negotiations, when its alternatives to SBC's proposed contract rates and terms - whatever those may be - will be premature deployment of facilities or service postponement. Neither alternative advances competition or the public interest in universal connectivity and efficiency.

[94] FCC Virginia Arbitration Order, ¶ 115, 117-118.

demonstration over a reasonable period of time to show that the traffic is consistent and network and cost justified a direct connection.

In contrast, SBC proposes no time limit. Under SBC's proposal, SBC could demand a direct connection at any point in time where there may be a DS1's worth of traffic – even if that traffic lasts only a minute, and occurs only once. This is hardly a sound proposal, and results in future disputes over the appropriateness of allowing a single snapshot in time serve as the basis for direct connecting with a carrier.

It is a far sounder policy for this Commission to adopt Level 3's language that allows for a reasonable period of time when the threshold is satisfied to warrant the investment and expense of establishing direct interconnection with another carrier. As such, the Commission should adopt Level 3's language in ITR Appendix Section 4.3.

(2) SBC

ITR Issues 5 through 9 (as well as IC Issue 10) relate to Level 3's attempt to include transiting obligations in the interconnection agreement. Transiting is where SBC acts as a middleman to transport traffic between Level 3 and a third party carrier. That is, transit traffic originates on Level 3's network, is handed off by Level 3 to SBC, and is then handed off by SBC to a third party carrier for termination on its network; or, conversely, the traffic moves in the opposite direction, from a third party carrier, through SBC's network, for termination on Level 3's network. In both cases, SBC merely serves as a transport provider between the two networks and does not become financially obligated to the terminating carrier (whether Level 3 or the third party carrier) for reciprocal compensation; the originating carrier (whether Level 3 or the third party carrier) remains obligated to pay such compensation to the terminating carrier.

Transit service is not subject to arbitration under Section 252. Specifically, transiting is not part of SBC's Section 251/252 obligations, nor is transiting a UNE (as the FCC made clear in paragraph 534 of the TRO[95]). Therefore, the terms relating to such service should not be included in the ICA. If the Commission nevertheless concludes that terms and conditions governing transiting should be including in the parties' interconnection agreement, it should adopt SBC's Transit Traffic Appendix and should reject Level 3's proposed transiting provisions for the ITR Appendix. SBC's Appendix is far more comprehensive than the transiting language Level 3 proposes for the ITR appendix. SBC's Transit Traffic Service Appendix accurately and completely describes the transiting arrangement and the obligations of each party, including the originating carrier, transiting carrier, and terminating carrier. In addition, the transiting appendix proposed by SBC clearly defines the threshold at which Level 3 would be required to establish a separate direct end office trunk group ("DEOT") for traffic exchange between Level 3 and a third party carrier.

---

[95] Report and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd. 16,978, corrected by Errata, 18 FCC Rcd. 19,020 (rel. Aug. 21, 2003) ("Triennial Review Order" or "TRO")

(3) Staff

The parties agree that SBC is not specifically required to provide transit service according to FCC rules. Level 3 Ex. 1.0 (Hunt) at 53; Level 3 – SBC 13State – DPL – ITR, Issue ITR – 6. Nevertheless, Level 3 proposes to include transiting service within the agreement citing as support policy considerations that arise when SBC fails to provide transiting service. Level 3 Ex. 1.0 (Hunt) at 55-56.

Staff considers potential public policy concerns that might result from SBC's failure to provide transit service to be essentially irrelevant, inasmuch as SBC makes such service available. Staff Init. Br. at 43. SBC has a currently effective transit offering in its Illinois tariffs. Staff EX. 1.0 (Zolnierek) at 22. Level 3 therefore can obtain transit service through SBC's Illinois tariffs, despite the fact that FCC rules do not specifically require SBC to provide such service. Staff Init. Br. at 43.

For these reasons, Staff recommends the Commission reject Level 3's proposal to include transit service rates, terms, and conditions within the agreement. Staff Init. Br. at 43. That is, Staff recommends the Commission reject Level 3's proposed Appendix ITR, Section 4.3 language including subsections 4.3.1, 4.3.2, 4.3.3, and 4.3.4. Id.

b) Analysis and Conclusions

Level 3 ITR-5. Level 3 should establish direct trunk arrangements with another carrier once there is a sufficient volume of traffic exchange between Level 3 and that other carrier. When such volume is achieved, transiting is no longer justified as an alternative to inefficient and anti-competitive deployment of CLEC resources. Instead, direct connection is sustainable, and an ILEC's resistance to indirect transiting (via the ILEC's network) is no longer an impediment to the CLEC's subsection 251(a)(1) duty to interconnect.

SBC avers that Level 3's definition and quantification what constitutes a sufficient traffic volume would be "acceptable" if Level 3 includes a clear time frame for establishing direct interconnection. SBC Init. Br. at 150-51. SBC's position is fair. Level 3's "commercial reasonableness" standard provides the parties insufficient clarity and is apt to provoke dispute. SBC's 60-day requirement should be adopted, but with a provision by which Level 3 may request additional time (during which SBC transiting will continue) if a third-party carrier is impeding interconnection[96]. Customers' ability to complete calls should not be compromised during such situations.

SBC ITR-5. Under Section 252 of the Federal Act, a party has the right to arbitrate any open issue arising Section 251 or any other unresolved dispute that the ILEC and CLEC have negotiated. Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co., 350 F. 3d 482 (5th Cir. 2003). In this instance, Level 3 avers that SBC is

[96] Our resolution of Level 3 Issue ITR-8 is related to this issue.

obligated to transit traffic by Section 251, as part of the ILEC interconnection duties in subsection 251(c)(2), and as part of the subsection 251(a)(1) duty of all telecommunications carriers to interconnect "directly or indirectly" with other carriers. SBC has consistently disagreed with Level 3's contentions[97].

Consequently, the Commission concludes that the question of whether transiting is part of SBC's Section 251 duties is an arbitrable issue. It is no different from any other dispute in which a CLEC claims that an ILEC has an obligation under Section 251 and the ILEC denies that claim. While we might ultimately decide that the asserted duty does not exist, we cannot make that assumption *ab initio* and refuse to consider the question. To do so would be to confer on the ILEC the unilateral power to determine what issues purportedly arising under Section 251 are arbitrable, which the ILEC could exercise by simply denying the CLEC's assertion[98]. A CLEC's right to arbitration, and our power and duty to conduct that arbitration, arise when the CLEC asserts an ILEC duty under Section 251 and the ILEC denies that duty[99].

As noted above, an issue is also arbitrable because the parties negotiated it, irrespective of whether it concerns an alleged duty under Section 251. However, what constitutes negotiation of an issue unrelated to Section 251 would likely differ from what constitutes negotiation of a Section 251 issue. Negotiation of a colorable Section 251 issue is compulsory, Coserv, *supra*, so the refusal to negotiate that issue inherently creates an arbitrable matter (for which the ultimate resolution may be that the asserted Section 251 right is rejected). With a non-251 issue, more than a mere CLEC proposal and ILEC refusal to negotiate would likely be required to constitute voluntary, bilateral negotiations. Since we hold that Level 3's transiting issues are properly arbitrable under the ambit of Section 251, we need not reach any conclusion concerning the parties' negotiations about transiting as a non-251 issue.

---

[97] *E.g.*, SBC Init. Br. at 146. At the same time, however, SBC asserts that "if the issue has to do with the duties described in section 251 of the [Federal Act], it is arbitrable." *Id.*, at 148. We agree.

[98] This does not mean that any such CLEC claim, no matter how frivolous or preposterous, creates an arbitration right. However, Level 3's contention here is clearly cognizable under Section 251. At the very least, the FCC has never ruled out a Section 251 transit duty, and the Virginia Arbitration Order imposed such a duty, while the court in Michigan Bell Telephone v. Chappelle, *supra*, upheld a parallel duty under state law upon review of an arbitration decision like this one. Moreover, in our resolution of Issue ITR-2 here, we conclude that a transit duty is consistent with Section 251, as well as authorized by the Illinois PUA.

[99] To be clear, while this sequence constitutes sufficient negotiation to support an arbitration request, it is not necessarily enough to constitute the "good faith" negotiations under subsection 251(c)(1). Typically, more than an assertion and denial are required for good faith negotiation.

6. ITR-6 (Level 3) Once Level 3 establishes direct trunk arrangements with other carriers, should SBC use reasonable efforts to minimize the amount of traffic directly routed through the Level 3 network to that terminating Carrier?

(SBC) Is a non-Section 251 service - transit service, in this instance - subject to arbitration under 252 of the 1996 Act?

a) Parties' Positions and Proposals

(1) Level 3

As stated in ITR Issue 2 above, the Commission should include transit terms and conditions in the agreement that will impose on Level 3 the obligation to direct connect with any other carrier with whom it exchanges the requisite amount of traffic. Level 3 proposes language in ITR Appendix Section 4.3.1 that imposes the obligation, to direct connect when traffic exceeds one DS1's worth of traffic for three consecutive months on SBC as well. In other words, as SBC will also have traffic that it needs to exchange with other carriers, Level 3's language makes the direct connection terms reciprocal on Level 3 and SBC. To Level 3, the fact that there is even a dispute on this topic speaks volumes. It is only fair and proper to impose on each Party the same obligations to direct connect upon satisfying the proposed threshold. As such, the Commission should adopt Level 3's language in ITR Appendix Section 4.3.1.

(2) SBC

Same as SBC position for IC-5

(3) Staff

The parties agree that SBC is not specifically required to provide transit service according to FCC rules. Level 3 Ex. 1.0 (Hunt) at 53; Level 3 – SBC 13State – DPL – ITR, Issue ITR – 6. Nevertheless, Level 3 proposes to include transiting service within the agreement citing as support policy considerations that arise when SBC fails to provide transiting service. Level 3 Ex. 1.0 (Hunt) at 55-56.

Staff considers potential public policy concerns that might result from SBC's failure to provide transit service to be essentially irrelevant, inasmuch as SBC makes such service available. Staff Init. Br. at 43. SBC has a currently effective transit offering in its Illinois tariffs. Staff EX. 1.0 (Zolnierek) at 22. Level 3 therefore can obtain transit service through SBC's Illinois tariffs, despite the fact that FCC rules do not specifically require SBC to provide such service. Staff Init. Br. at 43.

For these reasons, Staff recommends the Commission reject Level 3's proposal to include transit service rates, terms, and conditions within the agreement. Staff Init. Br. at 43. That is, Staff recommends the Commission reject Level 3's proposed Appendix ITR, Section 4.3 language including subsections 4.3.1, 4.3.2, 4.3.3, and 4.3.4. Id.

b) Analysis and Conclusions

Level 3 ITR-6. The Commission presumes that SBC is already directly interconnected with every active CLEC in territory SBC serves (and will interconnect with any such CLEC commencing operations in the future). Nonetheless, we agree with SBC that the second sentence in Level 3's proposed Section 4.3.1 is unacceptable unless the particular obligation in that sentence is reciprocal. Since Level 3 perceives value in the conservation of interconnected assets, it cannot fairly withhold that value from SBC.

With respect to disincentives to transiting, we reject SBC's request to increase the price of transiting if traffic exceeds a predetermined monthly maximum. SBC Init. Br. at 149. The parties appear to agree on the thresholds at which a party relying on transiting will have to establish direct interconnection with a third-party carrier. There is no reasonable justification, then, for effectively penalizing Level 3 usage that falls beneath that threshold, but exceeds SBC's proposed monthly transiting maximum. The Commission notes that SBC does not characterize its transit price increase as a penalty. But we see no more logical description for a rate hike that would discourage Level 3 from expanding usage to the point at which it would have to *stop* using SBC's network for indirect interconnection.

Also regarding pricing, SBC is correct that Level 3 fails to address that matter. SBC Init. Br. at 152. The ICA must contain a provision establishing and applying SBC's Transit Traffic Services rate. Moreover, that rate need not be TELRIC-based. SBC accurately states that the Virginia Arbitration Order rejected TELRIC rates for transiting.

SBC ITR-6. The Commission's analysis and conclusions regarding SBC's Issue ITR-5 are fully applicable here and are therefore provide our resolution of this issue.

7. ITR-7 Not an Illinois issue.

8. ITR-8 (Level 3) Should the Agreement provide for a transition period that would allow Level 3 to transit traffic through SBC until its direct interconnection arrangements are in place with other carriers?

(SBC) Is a non-Section 251 service - transit service, in this instance - subject to arbitration under 25 of the 1996 Act?

a) Parties' Positions and Proposals

(1) Level 3

The Agreement should contain terms and conditions governing Transit Traffic, including terms that govern the transition period between the SBC-provided transit services and when Level 3 direct connects with the other carrier. Level 3's language is necessary to clarify the Parties' obligation to continue to provide transit services for the

limited period of time it takes to establish the arrangement necessary with the other carriers for the exchange of traffic. Again, Level 3's language in ITR Appendix Section 4.3.3 is reciprocal. Thus, by including these terms, both SBC and Level 3 are obligated to provide the transit service, thus ensuring that there will not be customers unable to complete calls.

Level 3's proposal to include transition terms is also consistent with the findings of the FCC's Virginia Arbitration Order. In that proceeding, the ILEC (Verizon) proposed language that would allow it to terminate transit services after a transition period "at its sole discretion" was not appropriate. The Wireline Competition Bureau held that such a proposal

> creates uncertainty and would be unworkable, because it puts Verizon in the position of determining whether AT&T has used "best efforts" and whether it has been unable to reach an agreement "through no fault of its own." We are thus concerned that Verizon's proposed language could lead to further disputes between the parties.[100]

As such, the Wireline Competition Bureau held that transition terms should be included in the Agreement ultimately sent to the FCC for approval. The same rationale applies here. The failure to incorporate the transition terms can only lead to future disputes over whether either Party is attempting to enter into the direct connection with the other carriers.

For these reasons, the Commission should adopt Level 3's language in ITR Appendix Section 4.3.3.

(2) SBC

Same as SBC position for IC-5

(3) Staff

The parties agree that SBC is not specifically required to provide transit service according to FCC rules. Level 3 Ex. 1.0 (Hunt) at 53; Level 3 – SBC 13State – DPL – ITR, Issue ITR – 6. Nevertheless, Level 3 proposes to include transiting service within the agreement citing as support policy considerations that arise when SBC fails to provide transiting service. Level 3 Ex. 1.0 (Hunt) at 55-56.

Staff considers potential public policy concerns that might result from SBC's failure to provide transit service to be essentially irrelevant, inasmuch as SBC makes such service available. Staff Init. Br. at 43. SBC has a currently effective transit offering in its Illinois tariffs. Staff EX. 1.0 (Zolnierek) at 22. Level 3 therefore can obtain transit

[100] FCC Virginia Arbitration Order, ¶ 115.

service through SBC's Illinois tariffs, despite the fact that FCC rules do not specifically require SBC to provide such service. Staff Init. Br. at 43.

For these reasons, Staff recommends the Commission reject Level 3's proposal to include transit service rates, terms, and conditions within the agreement. Staff Init. Br. at 43. That is, Staff recommends the Commission reject Level 3's proposed Appendix ITR, Section 4.3 language including subsections 4.3.1, 4.3.2, 4.3.3, and 4.3.4. Id.

b) Analysis and Conclusions

Level 3 ITR-8. Level 3's proposed Section 4.3.3 is neither entirely coherent nor sensible[101]. Level 3's apparent concern is that SBC will cease transiting before Level 3 has completed alternative arrangements. As we stated in our resolution of Level 3 Issue ITR-5, the ICA must ensure continued transiting if the actions or omissions of a third-party carrier prevent such completion within the 60-day period discussed in connection with Level 3's ITR-5.

SBC ITR-8. The Commission's analysis and conclusions regarding ITR-5 are fully applicable here and are therefore provide our resolution of this issue.

9. ITR-9 (Level 3) Should Level 3 establish direct trunk arrangements with other carriers once is a sufficient volume of traffic exchange between Level 3 and the other carriers?

(SBC) Is a non-Section 251 service - transit service, in this instance - subject to arbitration under 25 of the 1996 Act?

a) Parties' Positions and Proposals

(1) Level 3

The issues raised in ITR Appendix Section 4.3.4 are related to ITR Issues 1, 5, and 8 above, and Level 3's language should be adopted for the reasons stated therein. Further, Level 3's language in ITR Appendix Section 4.3.4 mandates that Level 3 must use commercially reasonable efforts to establish the direct interconnection with the other carriers when SBC notifies it that it has surpassed the threshold. The terms in question provide clarity on the obligations imposed under the Appendix, and will assist in enforcing the transition terms discussed in ITR Issue 8 above. For these reasons, the Commission should adopt Level 3's language in ITR Appendix Section 4.3.4.

[101] *E.g.*, there is no Section 4.2.2, and the "Effective Date" is not identified. If that date is the effective date of the ICA, it undercuts Level 3's asserted need for SBC transiting, since it obliges Level 3 to make arrangements with carriers with whom it may exchange minimal traffic.

(2) SBC

Same as SBC position for IC-5

(3) Staff

The parties agree that SBC is not specifically required to provide transit service according to FCC rules. Level 3 Ex. 1.0 (Hunt) at 53; Level 3 – SBC 13State – DPL – ITR, Issue ITR – 6. Nevertheless, Level 3 proposes to include transiting service within the agreement citing as support policy considerations that arise when SBC fails to provide transiting service. Level 3 Ex. 1.0 (Hunt) at 55-56.

Staff considers potential public policy concerns that might result from SBC's failure to provide transit service to be essentially irrelevant, inasmuch as SBC makes such service available. Staff Init. Br. at 43. SBC has a currently effective transit offering in its Illinois tariffs. Staff EX. 1.0 (Zolnierek) at 22. Level 3 therefore can obtain transit service through SBC's Illinois tariffs, despite the fact that FCC rules do not specifically require SBC to provide such service. Staff Init. Br. at 43.

For these reasons, Staff recommends the Commission reject Level 3's proposal to include transit service rates, terms, and conditions within the agreement. Staff Init. Br. at 43. That is, Staff recommends the Commission reject Level 3's proposed Appendix ITR, Section 4.3 language including subsections 4.3.1, 4.3.2, 4.3.3, and 4.3.4. Id.

b) Analysis and Conclusions

Level 3 ITR-9. On its face, this issue is identical to Level 3 Issue ITR-5. According to SBC, however, the real dispute concerns whether SBC must notify Level 3 that the DS-1 level has been reached for transit traffic associated with a third-party carrier (triggering the requirement to make alternate arrangements with that carrier). SBC Init. Br. at 151-52. In our view, the responsibility to monitor usage and, when necessary, make alternate arrangements, lies with the party that has no direct interconnection with the carrier with whom the DS-1 threshold has been reached. In practice, that will likely always be Level 3. Nonetheless, a neutral provision should be crafted that reflects the principle articulated in the preceding sentence.

SBC ITR-9. The Commission's analysis and conclusions regarding SBC Issue ITR-5 are fully applicable here and are therefore provide our resolution of this issue. ITR-10 Not an Illinois Issue.

10. ITR-10 Not an Illinois Issue.

11. ITR-11 (Level 3)(a) Should Level 3 be able to establish a Single Point of Interconnection in each LATA?

(Level 3)(b) Should Level 3 be obligated to build out separate interconnection trunks for local and non-local traffic?

(SBC)(a) Should Section 5.3 address only Local Interconnection Trunk Groups?

(SBC)(b) Should InterLATA Toll Traffic be routed over separate trunk groups from Section 251 (b)(5)/ InterLATA Traffic when there is a single access tandem in CA, NV and Midwest states?

a) Parties' Positions and Proposals

(1) Level 3

The SBC contract language prohibits the use of interconnection trunks for InterLATA traffic between SBC customers and Level 3 customers. While SBC allows Local and IntraLATA traffic on the interconnection trunks, SBC would require Level 3 to provision separate trunk groups for InterLATA traffic between SBC and Level 3 customers. This requirement would force Level 3 to provision separate trunk groups to every SBC tandem and end office where Level interconnects thus creating, over time, a second network.

There has been some confusion as to the nature of the second set of trunk groups that the SBC language would force Level 3 to create. These trunk groups have been called Feature Group D trunk groups in some contexts, but this has led to their confusion with Meet Point Trunk Groups. Meet Point Trunk Groups are trunk groups from Level 3 to IXCs that are routed through SBC tandem switches. Level 3 needs Meet Point Trunk Groups to complete calls to IXCs where Level 3 has no direct connectivity to the IXCs. Level 3 and SBC have agreed to provision separate trunk groups for Meet Point traffic to SBC tandem switches. So Meet Point Trunk groups are not the issue.

What remains in dispute is whether SBC should be permitted to require Level 3 to construct and pay for a second (duplicative) set of trunk groups according to terms, rates and conditions contained in SBC's FCC Tariff No. 1, Section 6. At the most basic level, SBC seeks to require separate trunk groups for InterLATA traffic between SBC customers and Level 3 customers. Such trunks would need to be provisioned to each SBC tandem and to each SBC end office where the traffic is greater than one DS1 equivalent. Level 3 has never provisioned trunks of this nature to SBC, so this would constitute new, unnecessary trunk groups. The sensible alternative is to allow this traffic to flow over existing interconnection trunk groups along with local and IntraLATA traffic. This would also eliminate any argument about which trunks IP traffic should ride.[102]

[102] A single trunk group would carry local exchange, extended area service, intraLATA toll, interLATA toll, exchange access, IP-Enabled, ISP-Bound and other miscellaneous telecommunications traffic. Hunt Direct, p. 38.

Accordingly, by building out multiple interconnection trunks for traffic that is rated according to tariffs in some instances and federal law in others and paying federally tariffed rates for the privilege of building out a second expensive network that ties up SBC's tandems serves only SBC's short term pecuniary interests without regard to technical feasibility, industry practice or sound methods for handling the billing concerns SBC trumpets as justification for this expensive and technically challenged arrangement.[103]

From a network perspective, the evidence is unambiguous that, should the Commission adopt SBC's proposals on Issues 2 and 6, Level 3 will face an increase in the following:

1. The larger number of DS1s needed to carry the same amount of traffic will increase the number of facilities in use and the number of switch terminations for those facilities.

2. Increasing the number of switch terminations can cause one company or the other to demand additional switch modules, increasing the capital requirements.

3. Switches themselves can handle only a limited number of switch modules and DS1 terminations.

4. At some point, the additional trunk ports will increase the likelihood of tandem exhaust (which occurs when SBC exhausts the number of available trunk for interconnection.)

5. Likewise, fiber facilities carry a discrete number of DS1s on a given amount of lit fiber. Increasing the number of DS1s can require a company to add fiber equipment to increase capacity.[104]

Interestingly, the evidence also indicates that network impact of SBC's proposals might outweigh or at least decrease the positive financial impact from revenues derived from forcing Level 3 to pay for its massive interconnection architecture at retail federally tariffed access rates (which include both trunk and facilities charges). Specifically, the evidence indicates that if Level 3, and any other interconnecting CLEC, is required to duplicate facilities unnecessarily, SBC would be required to duplicate trunk groups at each and every tandem or end office where Level 3 currently has connected its interconnection infrastructure.[105] SBC, in other words, would have Level 3 (and any other CLEC) double the number of trunk groups throughout its network, which in Level 3's case doubles the number of trunk ports needed at each and every tandem and end

[103] Gates Direct, p. 33-36.

[104] See, Wilson Direct, p. 20.

[105] Gates Direct, p. 34-36.

office where Level 3 already interconnects. That effort would tie up massive numbers of trunk ports region-wide. Multiply that across all CLECs and tandems would likely exhaust very quickly, completely inhibiting CLECs from exchanging traffic with SBC.

Level 3's proposal, by contrast, is based in sound engineering principles that ensure the efficient and economic exchange of differently rated traffic based upon existing practice.[106] So in addition to saving SBC the unnecessary expense and hassles associated with increased levels of blocked calls (due to using duplicate facilities rather than a single appropriately sized one) and saving SBC and all other CLECs from accelerated tandem exhaust, Level 3 will pay SBC both the per minute charges and the additional facilities and trunk charges apportionable tariffed switched access schemes.[107] Moreover, Level 3 and SBC would continue to pay reciprocal compensation as it is today based upon their current agreement or according to federal law. As described above, Level 3 would accurately allocate these charges according to industry-standard PIU and PLU factors.[108]

As a legal matter, Section 251(c) of the Act obligates all local exchange carriers, like SBC, to provide non-discriminatory interconnection. It also applies additional obligations on incumbent LECs. Section 251 (c)(2)(B), for example, unambiguously requires that SBC provide Level 3 with interconnection "at any technically feasible point within its network." Level 3, therefore, may choose the manner in which the interconnection will take place. As a market-based competitor holding only a mere fraction of SBC's market power, Level 3 must choose the most efficient interconnection methods possible. As SBC's testimony demonstrates, the competitive telecommunications market is harsh and unforgiving.[109] Yet, here SBC insists upon an interconnection architecture that the record clearly reveals is technically infeasible (if not irresponsible).[110] It is an architecture that the parties (and carriers nationwide) already use to exchange differently rated traffic. BellSouth voluntarily agreed with Level 3 to exchange all traffic, including interLATA toll and IP Enabled Traffic, *over a single trunk group.*[111] This point alone substantially if not completely justifies approval of Level 3's request. According to FCC Rule 51.321(c), "a previously successful method *of obtaining interconnection* or access to unbundled network elements at any particular premises *or point on any incumbent LEC's network is substantial evidence that such*

---

[106] Hunt Direct, p. 45.

[107] Level 3 will pay SBC's Switched Access Charge for all traditional circuit switched phone-to-phone interLATA toll traffic. Hunt Direct, p. 45.

[108] The PLU determines the percent of traffic carried over the trunks that was local in nature and not subject to access charges. Wilson Direct, p. 21-22. Level 3 will provide SBC with auditable records upon which the PLU can be verified

[109] Egan Direct, p. 6.

[110] Wilson Direct, p. 15-17, 26-27; Hunt Direct, p. 44.

[111] Hunt Direct, p. 47.

method is technically feasible in the case of substantially similar network premises or points."[112]

Above and beyond the evidence that shows Level 3's approach is eminently feasible, practical, efficient and economically balanced, SBC's own witness does not dispute the fact that it is technically feasible to exchange all forms of traffic over a single trunk group. Rather, Mr. Albright explains that "previous [FCC] decisions allowed each carrier to combine traffic as long as the carrier did not do so to avoid paying access charges."[113]

To Level 3, that should be the end of the issue. Where the language of a statute is clear and unambiguous, a court must give it effect as written, without reading into it exceptions, limitations, or conditions that the legislature did not express. "We are to begin with the text of a provision and, if its meaning is clear, end there." Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 6, 120 S.Ct. 1942 (2000) ("Congress 'says in a statute what it means and means in a statute what it says there.'" (quoting Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 254, 112 S.Ct. 1146 (1992)). "In interpreting the meaning of a statute, it is axiomatic that a court must begin with the plain language of the statute." United States v. Prather, 205 F.3d 1265, 1269 (11th Cir. 2000). When the statutory language is clear on its face, an inquiring court must apply the statute as written, and "need not consult other aids to statutory construction." Atlantic Fish Spotters Ass'n v. Evans, 321 F.3d 220, 224 (1st Cir. 2003); U.S. v. Charles George Trucking Co., 823 F.2d 685, 688 (1st Cir. 1987) ("So long as the statutory language is reasonably definite, that language must ordinarily be regarded as conclusive.").

Under Section 251(c)(2)(C), SBC is obligated to provide interconnection to Level 3 that is at least equal in quality to that provided SBC's affiliates or any other carrier. For years, ILECs such as SBC routinely have established and used network facilities to carry all types of traffic on a single trunk.[114] Further, the evidence demonstrates that many CLECs are currently using interconnection trunk groups for multiple types of traffic in many states, some of them for more than five years.[115]

To comply with the nondiscriminatory requirements of Section 251(c)(2)(C), SBC must extend the same level of interconnection to Level 3 that SBC provides to itself or another carrier. If SBC makes available to itself or its affiliates local interconnection trunks that carry mixed types of traffic, SBC is required by Section 251(c)(2)(C) to make

---

[112] 47 C.F.R. § 51.321.

[113] Albright Direct, p. 42-43.

[114] The FCC established rules for the calculation of PIU factors over two decades ago, allowing interexchange carriers and LECs to interconnect without establishing separate trunk groups for interstate and intrastate traffic. *See* Investigation of Access and Divestiture Related Tariffs, 97 FCC 2d 1082 (1984). See also, Petition, ¶¶ 39, 42.

[115] Wilson Direct, p. 21.

the same available to Level 3. For this reason alone, SBC's proposals must be rejected in their entirety, and Level 3's extension of the current interconnection regime be adopted.

In light of the fact that SBC's proposed language prohibits Level 3 from interconnecting at any technically feasible point in violation of Section 251(c)(2)(B) and fails to provide Level 3 with interconnection that is at least equal to that provided itself in violation of Section 251(c)(2)(C), then SBC's language fails to meet the "Just and Reasonable" standard in violation of Section 251(c)(2)(D).

Level 3 also argues that the FCC's Verizon Arbitration Order provides guidance on the appropriate manner in which the Commission should address the issue. Just as with SBC in this arbitration, in the FCC Virginia Arbitration Order[116], Verizon had attempted to impose on WorldCom the obligation to create trunk group facilities distinct from WorldCom's existing trunk groups solely for the purpose of routing non-local exchange traffic. WorldCom objected because it imposed a disproportionate expense on WorldCom to create these additional trunk groups. Verizon contended that the separate trunk groups were necessary to ensure that it was receiving accurate compensation from WorldCom. The FCC Wireline Competition Bureau, however, rejected the ILEC's argument and held that "that measures less costly than establishing separate trunking may be available to ensure that Verizon receives appropriate payment.[117]

Level 3's proposed language reflects the FCC Wireline Competition Bureau's conclusions in the Virginia Arbitration Order. By contrast, SBC's proposed language imposes on Level 3 a disproportionate level of expense by attempting to create an obligation that Level 3 establish separate trunk group facilities distinct from the existing local Trunk Groups solely for the purpose of routing non-local exchange traffic. Finally, Level 3 points the Commission to a number of orders from other state commissions that support its positions.

A fundamental question embedded in these issues is whether SBC has any authority to force another carrier (here Level 3) to segregate traffic exchanged between the Internet and the PSTN onto separate trunk groups by application of its federal tariffs. Setting aside the staggering bravado with which SBC complains to state and federal

---

[116] FCC Virginia Arbitration Order, at ¶52.

[117] Order Approving Arbitration Agreement with Modifications, In the matter of the application of Sprint Communications Company, L.P. for arbitration to establish an interconnection agreement with Ameritech Michigan, Case No. U-11203, pp. 4-5 (1997); Amended Final Order Modifying Arbitration Award and Approving Interconnection Agreement. In the Matter of: Petition of Sprint Communications Company L.P. d/b/a Sprint for Arbitration with Verizon Southwest Incorporated (f/k/a GTE Southwest Incorporated) d/b/a Verizon Southwest and Verizon Advanced Data Inc. Under the Telecommunications Act of 1996 for Rates, Terms, and Conditions and Related Arrangements for Interconnection, Texas PUC Docket No. 24306 (May 14, 2004);Order, In Re AT&T Communications of the Southwest, Inc., Case No. TO-97-40, 1996 WL 883975, p. *6 (1996); US West Communications, Inc. v. MFS Intelnet, Inc., 193 F.3d 1112, pp. 1124-1125, 1999 WL 799082 (9th Cir.(Wash.)) (1999)

regulators that ISP-bound traffic (i.e. that traffic originating on the PSTN and terminating to the Internet) should be subject to bill and keep, while simultaneously claiming that access charges apply when signals containing voice originate to or terminates from the Internet, SBC's reliance upon its federal tariffs for such justification jeopardizes the validity of their federal access tariffs.

As explained in the Intercarrier Compensation section below, SBC acknowledges that IP-Enabled traffic is "information" services traffic. As further described in the Intercarrier Compensation section below, "Information Services" are regulated under Title 1 of the Act; they not "telecommunications services" which are regulated under Title II. Tariffs are creatures of Title II of the Act.

Congress has enacted a detailed system for governing carrier rates for jurisdictionally interstate communications in Sections 201 through 208 of the Act. Substantively Section 201(b) requires rates terms and conditions to be "just and reasonable," while Section 202 bans unreasonable discrimination.

These substantive requirements are implemented via Sections 203 through 208. Section 203 requires that tariffs ("schedules") be filed for all "interstate and foreign wire and radio communications." 47 U.S.C. § 203; MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 512 U.S. 218, 229-231 (1994) ("MCI v. AT&T"); AT&T v. Central Office Telephone, 524 U.S. 214 (1998). Section 204 allows the FCC to suspend filed but not-yet-effective tariffs; places the burden of justifying them on the carrier; and permits retroactive refunds of initially-suspended charges found to be unreasonable. Southwestern Bell v. FCC, 168 F.3d 1344, 1350 (D.C. Cir. 1999). Section 205 allows the FCC to prescribe changes to existing tariffs, but only prospectively. Illinois Bell v. FCC, 966 F.2d 1478, 1481 (D.C. Cir 1992). Section 206 establishes carrier liability for damages due to their violations of the Act. MCI Telecom. Corp. v. FCC, 59 F.3d 1407, 1413 (D.C. Cir. 1995), *cert. denied,* 517 U.S. 1240 (1996). Section 208 directs the FCC to adjudicate such claims. AT&T v. FCC, 978 F.2d 727, 732 (D.C. Cir. 1992), *cert denied,* 509 U.S. 913 (1993).

Consistent with this detailed statutory design, the FCC has promulgated extensive rules applicable to federal tariffs, primarily in Part 61 of the FCC's rules. Primary among tariff requirements is clarity. "In order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations." 47 C.F.R. § 61.2.

SBC maintains, without legal justification, that Section 6 of its federal access tariff (FCC No. 1) specifically requires that Level 3 purchase Feature Group D access trunks for the exchange of information services traffic between SBC and Level 3. Nowhere does this tariff, however, clearly and explicitly apply its rates and regulations to information services language. Moreover, by definition, it could not do so. Even if SBC's attempts to argue its way out of well settled law that enhanced service providers are not customers but rather carriers under federal law, no state or federal commission has stated such is the case. In either case, SBC's tariff must be rendered invalid and possibly *void ab initio* to the extent is seeks to leverage ambiguity either in the tariff or in

state and federal regulation. Moreover SBC risks liability for unjust rates and unreasonably discriminatory practices to the extent it seeks to apply access tariff rates terms and conditions to traffic that is either outside of the tariff's scope or to which the tariff because of inherent and impermissible ambiguity, applies.[118]

On purely jurisdictional grounds, however, this Commission is precluded from finding that SBC's access tariffs require Level 3 to purchase Feature Group access trunks for the exchange of IP-Enabled traffic. Without those tariffs, SBC has no basis to even offer Level 3 Feature Group D access services for the exchange of IP-Enabled traffic.

The issue facing the Commission is actually quite simple: Is there any technical justification in network engineering or design that should preclude Level 3 from exchanging all forms of telecommunications traffic over a single trunk group? As demonstrated in great detail above, the clear answer to that query is "no". In fact, the evidence shows that it is always preferable to combine as much traffic as possible onto a single trunk group. When a large trunk group is split into two trunk groups half their size (as SBC would have happen), the total carrying capacity of the two smaller trunks is smaller than the original trunk larger group. Thus, SBC's proposal to split the existing trunk group into multiple trunk groups to carry the various types of traffic actually results in a far less efficient network, with related increases in costs of providing the additional trunk groups.

Moreover, SBC's proposal increases the burden on both Parties' networks, requiring duplicative trunk groups connecting each and every switching facility to Level 3's POI – one for local and intraLATA toll traffic, one for non-local access traffic and IP Enabled Traffic (including ISP Bound Traffic) and yet another for transit traffic. SBC witness Albright not only acknowledges that SBC's approach increases Level 3's costs, but further that it imposes "almost no cost to SBC."[119]

Yet, what the evidence does *not* show is any technical or operational rationale for this inefficient engineering demand that SBC admits will drive up Level 3s costs of providing service. The reason for that evidentiary vacuum is simple -- there is no

---

[118] The FCC and the DC Circuit Court of Appeals have repeatedly struck down CLEC tariffs that applied to TDM-IP traffic (i.e. ISP-bound traffic). Here, traffic would be delivered from the PSTN to the Internet and would also be delivered from the Internet to the PSTN. In both cases, whether for ISP-bound traffic or information services traffic (such as VoIP), the FCC has established how such traffic should be rated. Thus, any attempt by SBC to apply its federally tariffed rates, terms and conditions to this traffic must fail for the same reasons that CLEC attempts to apply tariffed rates, terms and conditions to ISP-bound traffic. In that series of cases, the FCC also held that the CLEC's tariff was *void ab initio. See, e.g.* Global Naps, Inc. v. FCC, 247 F.3d 252 (D.C. Cir. 2001); In The Matter Of Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., New York Telephone Company, And New England Telephone And Telegraph Company V. Global Naps, Inc., File No. E-99-22, FCC 99-381 Memorandum Opinion and Order (Rel. December 2, 1999).

[119] Albright Direct, p. 40-42.

technical or operational rationale for the proposal. Rather, SBC's concern is one of money. SBC wants to force Level 3 into this unnecessary and expensive network configuration in order to allow SBC to properly track and bill its access charges.

In comparison, under Level 3's proposal, each party is entitled to receive the rate of compensation that properly applies to each type of call, but this compensation does not come at the sacrifice of network efficiencies. Level 3's language continues the current interconnection structure whereby Level 3 can efficiently use its trunks for multiple types of traffic, while still making appropriate intercarrier compensation payments to SBC based on industry-standard Percent of Interstate Use ("PIU") and Percent of Local Use ("PLU") allocators.

Section 251(c)(2)(B) mandates that SBC provide Level 3 with interconnection "at any technically feasible point within its network." This section gives the requesting carrier, Level 3, the right to choose the manner in which the interconnection will take place. Level 3 has chosen to interconnect via a single set of trunks meeting at a specific point of interconnection in each local calling area. SBC's demands to have Level 3 build out additional and expensive trunks impose obligations on Level 3 that are inconsistent with the clear language of Section 251(c)(2)(B), with no technical reason or basis for doing so.[120]

Also, SBC's demands are inconsistent with Sections 251(c)(2)(C) and 251(c)(2)(D) of the Act, both of which impose an obligation for SBC to treat Level 3 in a nondiscriminatory manner when interconnecting. If SBC makes available to itself or any other carrier the ability to carry traffic over a single trunk group, it is obligated to do so for Level 3 as well. Even SBC witness Albright admits that combined traffic is currently exchanged over the same trunk groups today.[121] In addition, many CLECs are currently using interconnection trunk groups for multiple types of traffic in many states.[122] In fact, Level 3 and BellSouth have executed agreements that allow for the parties to exchange all forms of traffic, including interLATA toll and IP Enabled Traffic, over a *single trunk group.* [123] There can be no doubt that ILECs can, and indeed do, allow for exchanging all forms of traffic over a single trunk group.

Finally, Level 3's language is consistent with the FCC's Virginia Arbitration Order, where the FCC's Wireline Competition Bureau held that establishing separate trunks for traffic that may or may not have different forms of traffic that "would impose costs on WorldCom that are disproportionate to the problem sought to be solved." For this reason the Bureau went on to hold that "measures less costly than establishing separate trunking may be available to ensure that Verizon receives appropriate

---

[120] Wilson Direct, p. 15-17, 26-27; Hunt Direct, p. 44.

[121] Albright Direct, p. 43.

[122] Wilson Direct, p. 21.

[123] Hunt Direct, p. 47.

payment."[124] Level 3's proposed language reflects the FCC Wireline Competition Bureau's conclusions in the Virginia Arbitration Order. By contrast, SBC's proposed language imposes on Level 3 a disproportionate level of expense by imposing an obligation on Level 3 to establish separate trunk group facilities distinct from the existing local Trunk Groups solely for the purpose of routing non-local exchange traffic.

In light of the above arguments, the Commission must adopt Level 3's language in ITR Appendix Sections 5.3, 5.3.1.1 and 5.3.2.1.

(2) SBC

SBC explains that, pursuant to sections 5.3 and 5.4 of the parties' existing interconnection agreement, and section 3.1 of the Amendment to Level 3 Contract Superseding Certain Compensation, Level 3 has already established (and has agreed to maintain) two separate trunk groups – local interconnection trunk groups and Meet Point trunk groups.[125] The dispute here is whether Level 3 should be required to provision Feature Group D (FG-D) trunk groups in addition to local trunk groups to every switch where Level 3 has a significant amount of traffic." Level 3 maintains it should not, and seeks to use local interconnection trunk groups – instead of Feature Group D trunk groups – to carry interexchange traffic which Level 3 exchanges with SBC in its (Level 3's) capacity as an IXC. Level 3's proposal must be rejected for several reasons. *First*, terms and conditions applicable to the exchange of traffic between SBC and Level 3, where Level 3 is acting as an IXC, do not fall within the parameters of section 251 of the 1996 Act. Such terms and conditions therefore are not properly the subject of a section 251/252 interconnection agreement. Second, terms and conditions relating to Level 3's relationship with SBC, and its rights and obligations vis-à-vis SBC, when Level 3 is acting in its capacity as an IXC, are governed by federal access tariffs. Those federal access tariffs require interexchange traffic to be carried over Feature Group D trunks – not local interconnection trunks – and this Commission lacks jurisdiction to alter those federal access tariffs. Third, Level 3's proposal seeking to combine local/IntraLATA toll traffic with interexchange access traffic on the same trunk group should be rejected because it would create significant billing problems without any discernable upside.

[124] FCC Virginia Arbitration Order, ¶ 180 – 182.

[125] In section 5.4.1 of the ITR Appendix to the parties' existing interconnection agreement, Level 3 agreed to establish a Meet Point trunk group separate from the local interconnection trunk group: "InterLATA traffic shall be transported between CLEC switch and the SBC-13STATE Access or combined local/Access Tandem over a 'meet point' trunk group separate from local and IntraLATA toll traffic." And in section 5.4.3 of the ITR Appendix to the parties' existing agreement, Level 3 agreed to establish Meet Point trunk groups at every SBC access tandem: "When SBC-13STATE has more than one Access Tandem in a local exchange area of LATA, CLEC shall establish an InterLATA [*i.e.,* meet point] trunk group to each SBC-13STATE Access Tandem where the CLEC has homed its NXX code(s)."

SBC explains that ITR Issue 11(b) is similar to ITR Issue 11(a), and that Level 3's proposed language should be rejected and SBC's adopted for the reasons stated therein.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

The parties have refined their sub-issues to the single question of whether their ICA should authorize mixed traffic over combined trunks (Level 3) or segregated traffic over limited-purpose trunks (SBC). Level 3 Init. Br. at 47. As Staff aptly notes, that question pits Level 3's asserted benefits of combined trunking (reduced facilities expense and clutter) against SBC's asserted costs (measurement and audit expense, under-recovery of revenue). Staff Init. Br. at 37. Staff is also correct that there is scant quantitative evidence of those asserted costs and benefits.

Nonetheless, SBC does show that Level 3 already has local and meet point trunks in place, thus limiting Level 3's burden to the expense of additional trunking for non-meet point InterLATA traffic. Additionally, there is no disagreement that direct measurement will produce more accurate intercarrier compensation than will the allocation factors proposed by Level 3[126]. Consequently, the Commission finds insufficient basis for altering the course we have charted in previous (and recent) arbitrations, in which combined trunking has not been approved[127].

We disagree with Level 3's contention that the Federal Act establishes a CLEC right to combined trunking. Level 3 is correct that the Local Competition Order assures that carriers of, *inter alia*, interexchange traffic are entitled to interconnection under subsection 251(c)(2), so long as such interconnection is not "solely for the purpose of originating or terminating…interexchange traffic."[128] However, that right to interconnect facilities and equipment does not, on its face, create a right to a particular trunking arrangement. That more particular right must come from some statutory provision or from an FCC decision or rule.

Level 3 contends that such a right is implied by the subsection 251(c)(2)(B) ILEC duty to accommodate CLEC interconnection "at any technically feasible point within the [ILEC's] network." While that provision empowers a CLEC to determine *where* interconnection will occur (and to insist upon a single point of interconnection), it does

---

[126] SBC does use allocation factors, but when the CLEC does not provide CPN, rather than as a first choice. Tr. 399 (Douglas); Level 3 Ex. 3.0 at 34, fn. 25.

[127] *E.g.*, MCI/SBC Arbitration, Docket 04-0469, Nov. 30, 2004, at 102; AT&T/SBC Arbitration, Docket 03-0239, Aug. 26, 2003, at 153-154.

[128] Local Competition Order, ¶191.

not - either by its terms or pursuant to FCC interpretation - confer a right to a specific trunking arrangement.

Level 3 also cites the anti-discrimination provisions of subsections 251(c)(2)(C) and (D). The Commission concurs that inferior treatment would violate a CLEC's right to parity. However, Level 3 has not proven that disparity exists. Instead, SBC demonstrates that the pertinent trunking arrangements it proposes here are no different than the arrangements it has with its own affiliates. SBC Reply Br. at 84, fn. 26. SBC's traffic mix within its local network transport is irrelevant to Level 3's discrimination case, which is about trunk routing between carriers.

Additionally, Level 3 avers that the FCC, through its Wireline Competition Bureau, rejected segregated trunking on grounds of inefficiency and disproportionality in the Virginia Arbitration Order. We find that claim misleading. The ILEC there had requested separate trunking for busy line verification and emergency interrupt calls, not for the far greater traffic volume associated with local and interexchange services in general. Furthermore, the Bureau expressly stated that it was not interpreting or declaring rights and duties under Section 251 of the Federal Act, but determining the "more reasonable" approach to trunking, based on the facts presented there[129].

Finally, Level 3 contends that IP-enabled traffic is information services traffic, analogous to ISP-bound traffic. Per FCC rulings (and depending upon carrier choices under those rulings), ISP-bound traffic is subject to the same compensation regime as local traffic, thereby relieving ILEC concerns about traffic rating. However, given our conclusion elsewhere in this Arbitration Decision that we cannot and will not make rulings regarding IP-enabled services, the Commission will not attempt to decide whether IP-enabled traffic is information services traffic[130], whether it is analogous to ISP-bound traffic or whether it should be trunked similarly.

Therefore, absent an enforceable federal right to combined trunking (and, for that matter, absent an enforceable federal right to segregated trunking), this Commission, like the Wireline Competition Bureau, will determine the "more reasonable" approach. While Level 3 has made it a close question, we conclude, as indicated above, that segregated trunking is preferable because it will produce more accurate intercarrier billing and compensation and constrain auditing expenses[131]. The inefficiencies associated with segregated trunking are not adequately quantified or as conceptually obvious as Level 3 avers.

---

[129] Virginia Arbitration Order, ¶181.

[130] In the Vonage Order, at ¶14, fn. 46, the FCC expressly noted that it was not determining whether the IP-enabled service there was, or was not, an information service.

[131] We are mindful of Level 3's assertion that this ruling will grant SBC "the relief it is seeking at the FCC." Level 3 Init. Br. at 24. If that is so, it will only be for a very brief time period. An FCC ruling on the Level 3 Forbearance Petition (which may even precede approval of the ICA here) will soon determine which carrier ultimately prevails with regard to trunking.

12. ITR-12 (Level 3)(a) Should Level 3 and SBC exchange all types of Telecommunications Traffic over the interconnection trunks?

(Level 3) (b) Resolved.

(SBC) (a) Should direct End Office trunks terminate only section 251(b)(5)/IntraLATA Traffic?

(SBC)(b) - RESOLVED

a) Parties' Positions and Proposals

(1) Level 3

This issue is directly related to ITR Issue 1 above. The Commission should adopt terms consistent with its findings therein. For the reasons stated in IC Issue 1 above, the Commission must adopt Level 3's language in ITR Appendix Section 5.3.3.1.

(2) SBC

The disputed language on ITR Issue 12(b) (with SBC's in bold italic and Level 3's in bold underline) is:

> The parties shall establish direct End Office primary high usage Local Interconnection Trunk Groups for the exchange of ***Section 251(b)(5)/IntraLATA*** **Telecommunications** traffic where actual or projected traffic demand exceeds one DS1's worth of traffic for three (3) consecutive months as measured during the busy hour.[132]

Through its use of the term "telecommunications traffic," Level 3 again seeks authorization to carry interexchange access traffic over local interconnection trunk groups. Accordingly, this issue is related to ITR Issue 11(a) above and Level 3's proposed language should be rejected for the reasons discussed therein.

To the extent Level 3's proposed language is designed to permit it to route interexchange access traffic over Direct End Office Trunk Group ("DEOTs"), there are additional technical reasons why that proposal should be rejected. A DEOT is a direct trunk group between two end office switches. DEOTs are established between two end offices to alleviate tandem exhaust. More specifically, routing calls directly from one end office switch to the other end office switch by way of a DEOT eliminates the need to route through the serving tandem, thereby conserving tandem resources.

[132] As noted in the discussion of ITR Issue 12(b), SBC has agreed to Level 3's proposed language at the end of section 5.3.3.1 stating "for three (3) consecutive months as measured during the busy hour."

DEOTs carry only section 251(b)(5) traffic originated by the customers connected to one end office switch, destined for the customers connected to the other end office switch. SBC engineers each of its end office switches to handle the traffic and switching requirements needed to provide service to only the customers that are connected to each particular office. If the DEOT routes calls destined for customers that are in an office other than the office at the terminating end of a direct trunk, the end office would be forced to function like a tandem. SBC, however, purchases, administers, and maintains end office switches to function only as end office switches – not as tandem switches. End office switches are not designed to perform a tandem function and tandem switches perform functions that cannot be performed by an end office switch. If end office switches were required to act as a tandem switch, network resources for that switch would be used at a faster-than-planned rate, thereby causing SBC to purchase more resources than would otherwise be required and reducing the level of service provided to customers.

For these reasons, Level's 3's proposed language should be rejected and SBC's proposed language adopted.

(3) Staff

For the reasons identified with respect to Issue ITR – 1 above, Staff recommends that Level 3's proposal to combine interLATA and intraLATA traffic over common trunk groups be rejected. Staff Init. Br. at 43. The Staff therefore recommends that the Commission accept SBC's proposed language and reject Level 3's language for Appendix ITR, Section 5.3.3.1. Id.

b) Analysis and Conclusions

This issue has been refined by the parties in the same manner as ITR-11. Accordingly, the resolution of ITR-11, rejecting combined trunking, applies here as well.

13. ITR-13 - Resolved by the parties.

14. ITR-14 - Resolved by the parties.

15. ITR-15 - Resolved by the parties.

16. ITR-16 - Resolved by the parties.

17. ITR-17 - Resolved by the parties.

18. ITR-18 (Level 3)(a) Should IP Enabled Traffic be subject to cost-based compensation or non-cost based Access Charges?

(Level 3)(b) Should the parties be required to establish separate trunks for the exchange of IP-enabled traffic?

(Level 3)(c) Should the Agreement include SBC's proposed definition of Switched Access Traffic?

(Level 3)(d) Should the ITR Appendix make reference to and include the same definition, terms and conditions of Circuit Switched Traffic found in the IC Appendix?

(SBC)(a) Unless and until the FCC rules otherwise, must all switched access traffic, as defined in the manner proposed by SBC Illinois in Section 12.1, be terminated over feature group access trunks (B or D)(except certain types of IntaraLATA toll and Optional EAS traffic) and should all such traffic be subject to applicable interstate and intrastate switched access charges.

(SBC)(b) Should the Agreement specify procedures for handling interexchange circuit-switched traffic that is delivered over Local Interconnection Trunk Groups so that the terminating party may receive proper compensation?

a) Parties' Positions and Proposals

b) Level 3

SBC's definition of Switched Access Traffic, as presented in ITR Appendix Section 12.1, should not be included in the agreement. SBC's definition imposes a requirement that the definition include traffic that originates from the end user's premises in IP format and is transmitted to the switch of a voice communications provider when such switch utilizes IP technology, also known as IP-PSTN. To top it off, once SBC has deemed Level 3's traffic as Switched Access Traffic, the traffic is subject to SBC's access charges.

SBC's attempt to lump IP-Enabled Traffic into the definition of Switched Access Traffic is contrary to federal law, and an attempt by SBC to puff its access revenues with an additional source of funding. As explained in the discussions related to Intercarrier Compensation, there is no FCC order, rule or regulation that concludes that Level 3 should pay access charges when an SBC customer terminates a call to a Level 3 IP customer. Just the opposite. In the Worldcom Order, the US Court of Appeals for the District of Columbia held that Section 251(g) of the Act preserves the pre-1996 Act access charge rules. Because there was no pre-1996 access charge rule governing intercarrier compensation for IP-Enabled service traffic, such traffic must be exchanged at cost-based rates pursuant to Section 251(b)(5) of the Act.

In light of these facts, SBC's attempts to lump IP-Enabled Traffic into its misguided definition of Switched Access Traffic, done in an attempt to impose access charges on Level 3's traffic, violates federal law. The Commission must reject SBC's

language in ITR Appendix 12.1, and ensure that IP-Enabled Traffic is not subject to any form of access charge.

In its language in ITR Appendix Section 12.1, SBC imposes a requirement that Level 3 exchange its IP-Enabled Traffic, including IP-PSTN traffic, "over feature group access trunks". Such a requirement violates the unambiguous language of the Act, and must be rejected *in toto.*

Section 251(c)(2) of the Act requires SBC to provide Level 3 with interconnection "at any technically feasible point within its network". This section gives the requesting carrier the right to choose the manner in which the interconnection will take place. Level 3 has chosen to interconnect via a single set of trunks meeting at a specific point of interconnection in each local calling area.

This issue is also directly related to ITR Issue 11(b) above. For the reasons stated therein, and the fact that there are no technical reasons prohibiting SBC from using the local trunk groups for exchanging all forms of traffic, the Commission must reject SBC's proposed language attempting to force Level 3 to build out separate trunk groups to carry IP-Enabled Traffic. Rather, the Commission must adopt Level 3's more rationale recommendation in ITR Appendix Section 12.1, and refer to the definition of "Circuit Switched Traffic" as found in the IC Appendix.

(1) SBC

Issue ITR 18 concerns the proper routing treatment and compensation for PSTN-IP-PSTN and IP-PSTN traffic.[133] SBC proposes language at section 12.1 that would treat such traffic as switched access traffic subject to the applicable intrastate and interstate access charges. This proposal is reasonable and should be adopted because it preserves the access charge regime under Section 251(g) of the Act and comports with the FCC's existing rules and precedent regarding intercarrier compensation for calls terminating to the PSTN.

Level 3's position that "IP-enabled Services Traffic" is exempt from access charges and should be subject to reciprocal compensation under Section 251(b)(5) of the Act should be rejected. The FCC has conclusively resolved this debate in its

[133] SBC witness Mike Kirksey explained that "PSTN-IP-PSTN" (also known as "IP-in the middle traffic") is traffic that originates over a local exchange carrier's circuit-switched network and is delivered to an interexchange carrier that converts the traffic to IP format for transport across its network, and then delivers the traffic for termination over a local exchange carrier's circuit-switched network. Kirksey Direct at 4. "IP-PSTN Traffic" is traffic that originates from the end-user's premises in IP format, is transmitted in IP format to the switch of the service provider, which is then converted to circuit-switched format for delivery to the local exchange carrier on the PSTN for termination over that carrier's circuit-switched network. Id. at 4-5.

Access Avoidance Order[134] , leaving no question as to the application of switched access charges to PSTN-IP-PSTN traffic.

Moreover, under existing FCC precedent and rules, providers of IP-PSTN services must, unless specifically exempted from doing so, pay interstate and intrastate access charges when they send traffic to the PSTN. These rules are currently under consideration in the FCC's IP-Enabled Services NPRM[135], but the Commission should preserve the regulatory *status quo* by adopting SBC's position pending the outcome of that proceeding.

Level 3's contention that the FCC's Enhanced Service Provider ("ESP") exemption applies to IP-PSTN traffic, and thus, access charges do not apply, is also wrong, because the ESP exemption only allows for an exemption from access charges where access services are used to provide the link between the ISP and its own subscribers. The ESP exemption has never been extended to a situation where an ISP uses the PSTN to send traffic to non-customer third parties to whom it is not providing service. Therefore, the use of the PSTN by ISPs involving interexchange traffic (e.g., sending traffic to a LEC's telecommunications service customer on the PSTN) is subject to appropriate access charges, and not reciprocal compensation as Level 3 contends.

Level 3's reliance on the D.C. Circuit Court of Appeal's decision in WorldCom v. FCC, 288 F.3d 429 (D.C. Cir. 2002) in support of its position that reciprocal compensation under Section 251(b)(5) of the Act applies to the exchange of IP-Enabled Services Traffic between SBC and Level 3 is also misplaced. In WorldCom, the court held that section 251(g) did not exempt ISP-bound traffic from Section 251(b)(5) because it found that there were no rules governing intercarrier compensation for that type of traffic prior to the 1996 Act. But rules concerning the payment of access charges for PSTN-originated or PSTN-terminated interexchange traffic were in place long before the enactment of the 1996 Act. *See 47* C.F.R. § 69.5(b). Therefore, the FCC's existing rule is that access charges apply to IP-PSTN, and that rule should govern unless and until the FCC decides to change that rule in the future.

SBC's proposed language at section 12.1 reflects its position that all switched access traffic, including interexchange PSTN-IP-PSTN and IP-PSTN traffic, is properly routed over Feature Group (B or D) access trunks. Level 3 should not be allowed to avoid tariffed switched access charges by routing such interexchange traffic over local interconnection trunk groups, which are not intended for access traffic and do not permit SBC to bill access charges to Level 3. In circumstances where switched access traffic is improperly delivered over local interconnection trunk groups, SBC proposes that it be able in turn to deliver such traffic to the terminating party over local interconnection

---

[134] Order, In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephone Services are Exempt from Access Charges, WC Docket No. 02-361, ¶¶ 12, 19, rel. April 21, 2004 (FCC 04-97) ("Access Avoidance Order").

[135] In the Matter of IP Enabled Services, Notice of Proposed Rulemaking, WC Docket 04-36 (rel. Mar. 10, 2004).

trunk groups. But, if the delivering party is notified by SBC that such interexchange traffic is being improperly routed over local interconnection trunk groups, both parties should be required to cooperate to remove such traffic from those trunk groups so that they may secure the proper terminating access charges associated with switched access traffic.

Moreover, Level 3 erroneously asserts that SBC's position would unreasonably require it establish separate trunk groups to carry interLATA toll and IP-Enabled Services Traffic. But separate trunk groups for PSTN-IP-PSTN or IP-PSTN traffic would not be necessary to the extent that Level 3 already has separate trunk groups for both access and local traffic. And SBC asserts is simply asking that Level 3's existing interexchange PSTN-IP-PSTN and IP-PSTN traffic ride the same trunk groups as its other access traffic so that SBC Illinois can properly bill for such traffic. Moreover, SBC contends that it will permit Level 3 to terminate its "local" IP-PSTN traffic over its existing local interconnection trunks, pending the FCC's final order in the IP-Enabled Services NPRM.

(2) Staff

As an initial matter, Staff recommends that the Commission refrain from, for the reasons articulated in Issue IC – 2 above, determining rates, terms, and conditions for the exchange of IP-enabled traffic. Staff Init. Br. at 43-44. Accordingly, Staff recommends that the Commission reject all disputed language that does specify rates, terms, and conditions for IP-enabled traffic, including Level 3's cross reference to its proposed definition of circuit switched traffic (which merely serves as a complement to its proposed definition of IP traffic). Id. To implement this recommendation, the Staff recommends, consistent with its recommendations regarding Issue IC – 2, that the Commissions adopt SBC's language for Appendix ITR Sections 12.1 and 12.2, but also require the parties to revise this language to specifically indicate that it does not apply to IP-PSTN "VoIP" traffic. Staff Init. Br. at 43-44.

With respect to the consistency concerns identified by Level 3, Staff concurs with the general notion inherent in Level 3's proposal that traffic should be defined consistently between sections. Staff Init. Br. at 43-44; Level 3 – SBC 13 State – DPL - ITR, Issues ITR 18 and 19. However, SBC's Appendix ITR Sections 12.1 and 12.2 appear to match word for word SBC's Appendix IC Sections 16.1 and 16.2. Staff Init. Br. at 43-44. Therefore, adopting Staff's recommendation will not result in inconsistency between these sections. Id.

c) Analysis and Conclusions

Level 3 ITR-18(a) & (b). In our resolution of Level 3 Issue IC-2(a), below, we conclude that the FCC has preempted any jurisdiction we may have had over IP-enabled services, that there are no clear federal requirements for us to implement or enforce through the parties' ICA, and that ongoing FCC proceedings will, in the near future, determine Level 3's rights and duties respecting IP-enabled services.

Accordingly, we will make no rulings concerning such services in this Arbitration Decision.

Level 3 ITR-18(c). As discussed in our resolution of Issue DEF-19, the ICA already contains a definition of the term "Switched Access Service" in the GTC Definitions Appendix. We assume that SBC proposed much of its definition of "Switched Access Traffic" here for the purpose of linking IP-PSTN and "IP-in-the-middle" traffic to SBC's access charge regime and segregated trunking. In view of our rulings elsewhere in this Arbitration Decision, which exclude IP-enabled services from the ICA and confirm that "IP-in-the-middle" traffic is subject to access charges, we are not certain that SBC would continue to recommend its definition of "Switched Access Traffic." Furthermore, we held with respect to DEF-19 that two definitions for virtually identical terms, each applicable throughout the Agreement, would inject confusion into the ICA. Therefore, we will not approve much of SBC's proposed definition here, but will permit SBC to include certain portions of it with the definition in the GTC Definitions Appendix.

Specifically, SBC can include, in the definition addressed in DEF-19, the text beginning with the first use of the word "Notwithstanding" in proposed ITR Section 12.1, and extending through the end of that section. However, the term "251(b)(5) Traffic" must be replaced with "Telephone Exchange Service Traffic" or "Local Traffic," for the reasons stated in our resolution of Issues DEF-18 and IC-1. And, to be clear, none of the text prior to the first use of the word "Notwithstanding" in proposed Section 12.1 can be included[136].

Level 3 ITR-18(d). In our resolution of Issue DEF-3, above, we explained that a definition of "Circuit Switched IntraLATA Toll Traffic" is unnecessary in the ICA, since we decline to address IP-enabled services. For the same reasons, a definition of "Circuit-Switched Traffic" is unnecessary here.

SBC ITR-18(a) & (b). These sub-issues are subsumed by our resolution of the other sub-issues in ITR-18 and no additional ruling is necessary.

[136] We note that the text in ITR Sections 12.1 and 12.2 also introduces a term - "Local Interconnection Trunk Groups" – that has already been identified in connection with Issue DEF-10. There, the term encompasses "Section 251(b)(5) Traffic" and IntraLATA traffic. Here, the identical term refers to "Section 251(b)(5) Traffic" and ISP-Bound Traffic. This contradiction must be resolved. Additionally, as we declare elsewhere in this Decision, "Section 251(b)(5) Traffic" cannot be used in the ICA.

19. ITR-19 Should this appendix include a provision that states the parties agree to such provisions governing "IP Enabled Services" as may appear elsewhere in the appendix?

a) Parties' Positions and Proposals

(1) Level 3

In its language in ITR Appendix Section 13.1, Level 3 incorporates a reference to the Intercarrier Compensation Appendix terms related to the definition, terms and conditions of IP-Enabled Services as found in the IC Appendix. This clarification will reduce confusion over the terms related to IP-Enabled services, and future disputes between the Parties. There is no harm in incorporating a reference to other valid and applicable portions of the agreement. As such, the Commission must adopt Level 3's proposals in ITR Appendix Section 13.1.

(2) SBC

Issue ITR 19 is inextricably intertwined with Issue ITR 18, and concerns Level 3's proposed language at section 13.1, which provides that "The Parties agree to the definition, terms conditions, and use of IP Enabled Services Traffic according to Sections 3.2 and 17 of Appendix IC to this Agreement." SBC opposes Level 3's proposed language at section 3.2 of Appendix IC for the reasons explained above.[137] Because Level 3's proposed language at section 3.2 is inappropriate, the Commission should also reject Level 3's proposed language at ITR section 13.

(3) Staff

As an initial matter, Staff recommends that the Commission refrain from, for the reasons articulated in Issue IC – 2 above, determining rates, terms, and conditions for the exchange of IP-enabled traffic. Staff Init. Br. at 43-44. Accordingly, Staff recommends that the Commission reject all disputed language that does specify rates, terms, and conditions for IP-enabled traffic, including Level 3's cross reference to its proposed definition of circuit switched traffic (which merely serves as a complement to its proposed definition of IP traffic). Id. To implement this recommendation, the Staff recommends, consistent with its recommendations regarding Issue IC – 2, that the Commissions adopt SBC's language for Appendix ITR Sections 12.1 and 12.2, but also require the parties to revise this language to specifically indicate that it does not apply to IP-PSTN "VoIP" traffic. Staff Init. Br. at 43-44.

With respect to the consistency concerns identified by Level 3, Staff concurs with the general notion inherent in Level 3's proposal that traffic should be defined consistently between sections. Staff Init. Br. at 43-44; Level 3 – SBC 13State – DPL - ITR, Issues ITR 18 and 19. However, SBC's Appendix ITR Sections 12.1 and 12.2

[137] Section 17 of Appendix IC has been reserved for future use.

appear to match word for word SBC's Appendix IC Sections 16.1 and 16.2. Staff Init. Br. at 43-44. Therefore, adopting Staff's recommendation will not result in inconsistency between these sections. Id.

b) Analysis and Conclusions

Our resolutions of Level 3 Issues ITR-18(a) and (b) and IC-2(a) subsume this issue and make any additional ruling unnecessary.

E. Intercarrier Compensation ("IC")

1. IC-1 (Level 3) Should the interconnection Agreement classify the traffic exchange between the parties using the definitions from the Act, or should the Agreement classify the traffic according to SBC's interpretation of "Section 251(b)(5) Traffic", FX Traffic, ISP-Bound Traffic, Optional EAS Traffic (also known as 'Optional Calling area Traffic'), IntraLATA Toll Traffic, or InterLATA Toll Traffic, Meet Point Billing or FGA Traffic?

(SBC) Which party's proposed classifications of traffic should be used in the Agreement?

a) Parties' Positions and Proposals

(1) Level 3

SBC is attempting to restrict the scope of traffic to which Section 251(b)(5) intercarrier compensation regimes apply. Under the federal Act, Section 251(b)(5) applies to all telecommunications traffic, irrespective of where the calling and the called parties are physically located. By its very terms, Section 251(b)(5) applies to "the transport and termination of telecommunications." To this clear definition, SBC attempts to impose a geographic standard that is not contained in Section 251(b)(5). Indeed, SBC seeks to reincorporate a geographic test that the FCC abandoned in its 2001 ISP Remand Order. In that order, the FCC expressly repudiated earlier rules that limited Section 251(b)(5) to "local" traffic.[138] That ruling was not disturbed on appeal.

SBC's attempts to craft a definition of this "Section 251(b)(5) Traffic" is directed towards presupposing the results of the FCC's deliberations in the ISP Remand Order. Level 3 proposes that it would be best if the parties and this Commission wait until the FCC has released its ISP Remand Order. As such, Level 3 urges the Commission to reject SBC's attempts at preempting the FCC's deliberations in the upcoming ISP Remand Order, and reject SBC's proposed language in IC Appendix Sections 3.1, 3.1.1 – 3.1.5.

[138] ISP Remand Order, ¶¶ 37-42.

(2) SBC

Level 3's proposed Section 3.1 of Appendix Intercarrier Compensation ("IC") makes no sense. In that Section, Level 3 proposes to define all telecommunications traffic exchanged between the parties as one of five kinds of services defined by the 1996 Act (Telephone Toll Service, Telephone Exchange Service, Exchange Access Service, Telecommunications Services, or Information Services). But those categories are not mutually exclusive, and much (if not most) of the traffic exchanged by the parties simply cannot be shoehorned into one of Level 3's proposed classifications, to the exclusion of the others, as Level 3 proposes. Level 3's proposal would merely introduce confusion and uncertainty into the agreement.

Level 3's proposed Section 3.1 also serves no apparent purpose because in the remainder of its proposed Appendix IC, Level 3 discards the classifications it proposes in Section 3.1, and instead proposes different classifications to define the parties' reciprocal compensation obligations. Because the classifications in Level 3's proposed Section 3.1 are not used in any meaningful way within the Appendix IC, it makes no sense to include those classifications in that Appendix.

SBC's proposed Section 3.1, on the other hand, appropriately classifies traffic for purposes of reciprocal compensation and reflects the traffic classifications that the parties should use to define traffic for intercarrier compensation purposes.

(3) Staff

The Appendix Intercarrier Compensation "sets forth the terms and conditions for Intercarrier Compensation of intercarrier telecommunications traffic between" SBC and Level 3.[139] The parties offer competing proposals to classify traffic [as if "jurisdictionally"] for purposes of intercarrier compensation. Staff Init. Br. at 11.

The utility of these classifications, according to the Staff, will depend on how well the distinctions in traffic established in these classifications match the distinctions in compensation levels appropriate for the respective traffic types. Level 3's proposed classifications do not closely track distinctions in intercarrier compensation that have been identified in the agreed language between the parties or in Commission or FCC rules, regulations, or decisions. Accordingly, the Staff recommends the Commission reject them. Id.

SBC, however, offers classifications based upon traffic definitions contained in agreed language between the parties and various Commission and FCC intercarrier compensation orders. In the Appendix Intercarrier Compensation, the parties have agreed to identify for separate intercarrier compensation treatment, the following categories of intercarrier traffic: Optional EAS Traffic[140], IntraLATA Toll Traffic,[141] and

[139] Appendix Intercarrier Compensation, Section 1.1.

[140] Appendix Intercarrier Compensation, Section 8.

Meet Point Billing Traffic.[142] In addition, the FCC and Commission have intercarrier compensation rules and regulations, or have made determinations regarding intercarrier compensation, that result in separate intercarrier compensation rates for Section 251(b)(5) traffic[143], FX Traffic,[144] ISP-bound traffic,[145] and interLATA toll traffic,[146] respectively. Thus, the traffic distinctions proposed by SBC track very closely the distinctions in compensation levels appropriate for the respective traffic types. Staff Init. Br. at 11-12.

The Staff finds that SBC's classification proposal does, however, fail to distinguish one form of traffic that is receiving specific and unique treatment under reciprocal compensation rules and regulations from the FCC -- IP-PSTN traffic. On November 9, 2004 the FCC voted "that [it, the FCC], not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to IP-enabled services."[147] In particular, the FCC specifically indicated that it would address intercarrier compensation as it applies to IP-enabled traffic in its pending IP-enabled services proceeding.[148] Thus, the FCC is addressing reciprocal compensation for IP-enabled services specifically and separately from other types of traffic. Thus, Staff recommends the Commission accept SBC's proposed language for Appendix Intercarrier Compensation Section 3.1 with one modification. Staff recommends the

---

[141] Appendix Intercarrier Compensation, Section 14.

[142] Appendix Intercarrier Compensation, Section 12.

[143] 47 C.F.R. § 51, Subpart H - Reciprocal Compensation for Transport and Termination of Telecommunications Traffic; *Order on Remand and Report and Order*, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 / Intercarrier Compensation for ISP-Bound Traffic, FCC No. 01-131, CC Docket No. 96-98; 99-68 (April 27, 2001)("ISP Remand Order").

[144] Arbitration Decision at 120, 123-4, AT&T Communications of Illinois, Inc. / TCG Illinois and TCG Chicago: Verified Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company (SBC Illinois) pursuant to Section 252(b) of the Telecommunications Act of 1996, ICC Docket No. 03-0239 (August 26, 2003) (hereafter "AT&T Arbitration Decision")

[145] ISP Remand Order; AT&T Arbitration Decision at 120.

[146] 47 C.F.R. § 69.5; ; see also *Order*, Illinois Commerce Commission On Its Own Motion vs. Illinois Bell Telephone Company; et al., Investigation into Non-Cost Based Access Charge Rate Elements in the Intrastate Access Charges of Incumbent Local Exchange Carriers in Illinois; Illinois Commerce Commission On Its Own Motion, Investigation into Implicit Universal Service Subsidies in Intrastate Access Charges and to Investigate how these Subsidies should be Treated in the Future; Illinois Commerce Commission On Its Own Motion, Investigation into the Reasonableness of the LS2 Rate of Illinois Bell Telephone Company, ICC Docket Nos. 97-0601; 97-0602; 97-0516 (Consolidated); 2000 Ill. PUC Lexis 1004 (March 29, 2000) (hereafter "ICC Access Charge Order").

[147] FCC News Release, "FCC Finds That Vonage Not Subject To Patchwork of State Regulations Governing Telephone Companies", (November 9, 2004); found on the World Wide Web at:

http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254112A1.doc.

[148] Id.

Commission require the parties to insert one additional classification into this language – an IP-PSTN VoIP traffic classification. This will simply identify that IP-PSTN VoIP traffic is not, at this time, subject to the intercarrier compensation provisions applicable to any of the other classes of traffic in this contract. Of course, adding this class does not prevent the FCC from prescribing intercarrier compensation rules for IP-PSTN VoIP traffic that match intercarrier compensation rules applicable to other proposed SBC classes of traffic, or from determining that existing rules for such traffic apply to IP-PSTN VoIP traffic. Adding this class does, however, permit the FCC to prescribe separate and distinct rules for IP-PSTN VoIP traffic. Thus, with Staff's proposed modification, the distinctions in traffic identified by these classifications will be driven and, more importantly, will not drive differences in compensation levels appropriate for the respective traffic types. Staff Init. Br. at 12-13.

b) Analysis and Conclusions

Level 3's proposed classifications in its proposed section 3.1 mirror certain definitions promulgated by the FCC at 47 CFR 153. SBC objects that they are not "mutually exclusive," SBC Init. Br. at 72, but we note that the FCC believes these definitions are sufficiently delineated for the management of telecommunications nationwide. Moreover, potential overlap could be avoided here by deleting Level 3's proposed definition of the term "telecommunications services." While that term can provide a useful basis for distinguishing such services from non-telecommunications services, it is much too broad, and therefore inappropriate, for classifying services for intercarrier compensation purposes.

However, as SBC correctly points out, Level 3 inexplicably "discards the classifications it proposes in Section 3.1, and instead proposes different classifications to define the parties' reciprocal compensation obligations." Id., at 72-73. Consequently, Level 3's classifications in its Section 3.1 are either superfluous or subsumed by later proposed Level 3 definitions.

In view of the foregoing, the Commission directs the parties to adopt SBC's Section 3.1, but with modifications. In our resolution of Issues DEF-18 (above) and IC-3 (below), the Commission rejects SBC's proposed definition of the term "Section 251(b)(5) Traffic." Accordingly, that term cannot be included in Section 3.1 here. It should be replaced with the FCC's term "Telephone Exchange Service Traffic," which includes the specific definition set forth in 47 CFR 153(47)[149] (or the parties may include "Local Traffic" as an acceptable substitute). Additionally, for the reasons stated in our resolution of Issue ITR-2, transit traffic should be included in 3.1.

[149] The parties should determine between themselves whether "Optional EAS Traffic," as included in SBC's proposed Section 3.1, is subsumed by the definition of "Telephone Exchange Service," or whether it should be included as a separate classification. Additionally, SBC introduces the term "Switched Access Traffic" in its proposed Section 16.1 of the IC Appendix. The Commission does not perceive SBC's rationale for using different terminology in Section 3.1.

2. IC-2 (Level 3)(a) Should the Agreement contain terms and conditions for the compensation of IP-Enabled Traffic?

(Level 3)(b) Is IP-enabled traffic interstate in nature?

(Level 3)(c) Should the agreement contain language that is consistent with SBC's publicly-stated position as presented to the FCC that IP-Enabled Traffic is "indivisibly" interstate in nature?

(Level 3)(d) Should IP-enabled traffic be classified by the geographic location of the calling and called parties, or should the Agreement be consistent with SBC's publicly-stated position that it is not technically possible to track the jurisdictional nature of IP-Enabled Traffic?

(Level 3)(e) Should the agreement recognize that a net-protocol conversion occurs in IP enabled traffic?

(Level 3)(f) Should the parties include in the SS7 call setup message an indicator identifying IP originated traffic?

(Level 3)(g) Should SBC be able to force Level 3 to build out a separate FGD network for the exchange of IP enabled traffic when the parties do and can continue to exchange such traffic over existing interconnection facilities and compensate each other according to a Percentage of IP Use allocator, which allocator they could later revisit once the FCC determines how to handle this traffic pending several rulemaking proceedings?

(Level 3)(j) Should the Parties compensate each other for IP-enabled Services at $0.0005 to terminate IP-enabled Services Traffic?

(Level 3)(k) Should the categorization of Circuit Switched Traffic be consistent with the FCC's orders that distinguish Circuit Switched Traffic from IP enabled traffic?

(SBC) What is the proper routing, treatment and compensation for Switched Access Traffic including, without limitation, any PSTN-IP-PSTN Traffic and IP-PSTN Traffic?

a) Parties' Positions and Proposals

(1) Level 3

Initially, Level 3 notes that there are four pending proceedings at the FCC that will address the regulatory treatment of IP Enabled traffic, and the rate of compensation that will apply to the exchange of this traffic:

- In the Matter of Level 3 Communications LLC's Petition for Forbearance Under 47 U.S.C.§ 160(c) and Section 1.53 of the Commission's Rules from Enforcement of Section 251(g), Rule 51.701(b)(1) and Rule 69.5(b). ("Level 3 Forbearance Petition").[150]

- In the Matter of IP Enabled Services ("IP-Enabled Services Proceeding")[151]

- In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and In the Matter of Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order[152] (collectively "ISP Remand Order").

- Developing a Unified Intercarrier Compensation Regime, ("Intercarrier Compensation NPRM")[153]

While these issues are playing out in other proceedings, the Commission should let the FCC decide the compensation issues by rejecting SBC's attempts to set the rate of compensation for this traffic, and instead focus its efforts on the network architecture issues that address how Level 3 and SBC will exchange traffic.

Level 3 argues that the Act gives the FCC extensive authority over all compensation for IP-Enabled services. Thus, the Commission need not decide the exact rate of compensation that would apply to resolve this arbitration. For purposes of this Arbitration, Level 3 and SBC disagree on whether the Interconnection Agreement should contain terms with respect to the compensation of IP enabled traffic. Level 3

---

[150] WC Docket 03-266, Level 3, LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b), filed Dec. 23, 2003. ("Level 3 Forbearance Petition").

[151] WC Docket 04-36, In the matter of IP Enabled Services, Notice of Proposed Rulemaking, released March 10,

[152] CC Docket No. 99-68 and CC Docket No. 99-98, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, 16 FCC Rcd. 9151, 9166 (¶ 32) (rel. April 27, 2001) ("ISP Remand Order").

[153] CC Docket No. 01-92, In the Matter of Developing a Unified Intercarrier Compensation Regime Notice of Proposed Rulemaking, FCC 01-132 ¶¶ 72,112 (rel. April 27, 2001)("Intercarrier Compensation NPRM")

requests that the Commission conclude that the Interconnection Agreement between Level 3 and SBC contain no provisions that specifically set a rate of compensation for IP Enabled traffic. This would provide that the Commission reject *en toto* SBC's proposed Section 16.1 of the Intercarrier Compensation Appendix. If the Commission concludes that it must set the rate of compensation for IP Enabled traffic, Level 3 requests that the Commission set the rate of compensation at $0.0007 for the exchange of IP-enabled traffic (IP-PSTN or PSTN-IP).

Level 3 requests that the Commission reject SBC's attempts to define traffic in such a way that would impose access charges on IP enabled traffic.

Level notes that even SBC acknowledges that IP-enabled services—services that either begin or end on an IP network—are information services, and that providers of such services are information services providers.[154] Level 3 agrees with that statement. Level 3 further agrees with SBC's recent observation at the FCC when SBC stated that "IP-Enabled services should be deemed Title I information services."[155] As SBC observed,

> IP-enabled services may allow end users to connect to the Internet (a functionality that the Commission has long deemed an information service, gain access to stored files (such as voicemail or directory information), protect their privacy through customized call screening, and route communications in a manner customized to the end user's preferences. Many IP-enabled services also include a net protocol conversion that allows customers to interface with the PSTN – traditionally a hallmark of information services under the Commission's precedent.[156]

From Level 3's perspective, SBC's proposed contractual definition for "IP Traffic" is flawed and inconsistent with SBC's arguments before the FCC.[157] SBC attempts, through its proposed contract terms, to have Circuit Switched (or "TDM") compensation arrangements apply to IP-TDM and TDM-IP traffic. *First*, Level 3 argues that the Act defines information services without distinguishing between originating and terminating traffic.[158] SBC's proposed definition of "IP Traffic" in its Section 16.1 only includes traffic that originates with an IP end user and terminates on the PSTN. In other words,

---

[154] *See IP-Enabled Services*, WC Docket No. 04-36, Comments of SBC Communications, Inc. at 33 (filed May 28, 2004) ("SBC IP NPRM Comments").

[155] *SBC IP-Enabled Services Comments* at 33.

[156] *SBC IP-Enabled Services Comments* at 34.

[157] Hunt Direct, p. 72.

[158] *See* 47 U.S.C. § 153(20); *see also Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11,501, 11,511-53 ¶¶ 21-106 (1998) ("*Stephens Report*") (examining the statutory in great detail without noting any distinction between originating and terminating traffic).

according to SBC, it is attempting to convince this Commission that IP-Enabled services are only a one-way concept, IP to PSTN. Juxtaposed against that position before this Commission are SBC's comments to the FCC, where SBC's own definition of IP-Enabled Services contemplates a reciprocal traffic flows.

Second, SBC's definition includes only IP-enabled traffic that *originates* with a Level 3 or SBC end user – ignoring the fact that IP-enabled traffic can also flow in the opposite direction. SBC's unjust limitation is not found in any FCC rule or regulation. The traffic exchanged between Level 3 and SBC may originate on the customer premises equipment of the end user of SBC, Level 3, an information service provider, CLEC, ILEC or other telecommunications carrier.[159]

Level 3 and SBC both agree that IP-Enabled Services are interstate services. In comments filed by SBC in the IP-Enabled Services Rulemaking proceeding, SBC states:

> The inherently interstate nature of these [IP-enabled] services derives from the nationally and internationally dispersed networks over which they are provided. *These services are also indivisibly interstate* because their portable nature and the inherent geographic indeterminacy of IP transmissions make it infeasible to segregate any intrastate component of these services for regulatory purposes.[160]

SBC admits to the FCC that "when end users use an IP-enabled service to communicate with each other, the interstate nature of the service is engaged no matter where the end users are physically located."[161] Further, in its own Petition for a Declaratory Ruling Regarding IP Platform Services, SBC explains that "it would be impracticable, as well as inimical to the technological premise of the Internet, to separate out any discrete, 'intrastate' components of that data stream."[162]

Level 3 argues that, as an interstate service, this Commission is precluded from adopting SBC's contract terms that imposes access charges on IP-TDM or TDM-IP traffic. As interstate traffic, SBC may only assess access charges, if at all, when permitted to do so under the FCC's access charge rules. Section 69.5 of the FCC's rules, which governs the assessment of circuit-switched per-minute access charges,[163] classifies access customers as either "end users" or "carriers."[164] Specifically,

---

[159] Hunt Direct, p. 65.

[160] Hunt Direct, p. 66, citing to SBC IP-Enabled Services Comments at 26.

[161] SBC IP-Enabled Comments at 28.

[162] SBC Illinois's Response to Petition for Arbitration., June 28, 2004, at 37-38. ("SBC Petition")

[163] *See* 47 C.F.R. § 69.5.

[164] Hunt Direct, p. 68 explaining Section 69.5(a) which governs end users, while Section 69.5(b) governs carriers. Rule 69.5(c) provides for special access surcharges. *See* 47 C.F.R. § 69.5.

customers classified as end users pay flat rate "end user charges" (such as the Subscriber Line Charge),[165] while "all interexchange carriers" that "use local exchange switching facilities for the provision of interstate or foreign telecommunications services" pay "carrier's carrier charges."[166] As the FCC recently reaffirmed, "access charges are to be assessed on interexchange carriers."[167] Level 3 notes that the FCC classified information service providers as "end users," not carriers, for the purpose of applying its interstate access charge rules. [168] The FCC has reconfirmed this finding a number of times over the years, including in its Access Charge First Report and Order, wherein it stated that "incumbent LECs will not be permitted to assess interstate per-minute access charges on [information service providers.]"[169] The FCC did not distinguish between originating and terminating access charges but rather precluded incumbent LECs from assessing *any* access charges.

Accordingly, Level 3 argues, information service providers pay end user charges, not carrier charges, and thus are not subject to per-minute access charges.

In addition to the FCC actions stated above, Level 3 also argues that the Act bars the application of access charges to IP-Enabled Services. For instance, as the FCC has itself recognized, Section 251(b)(5) – the Act's reciprocal compensation provision – applies to all telecommunications traffic unless that traffic is carved-out by another provision of the Act, Section 251(g).[170] As the D.C. Circuit explained in 2002, Section 251(g) cannot function as a "carve-out" with respect to IP-enabled services traffic because there was no pre-1996 rule governing the exchange of such traffic between LECs. [171] Contrary to what SBC witness Mr. Kirksey contends, just as there was no "pre-Act" rule governing the exchange of ISP-bound traffic, there were no pre-Act rules governing exchange of IP-Enabled traffic. Absent any pre-Act rule, access charges cannot apply to such traffic under Section 251(g). Rather, as the FCC held in the ISP Remand Order, without Section 251(g), the reciprocal compensation regime of Section

---

[165] 47 C.F.R. § 69.5(a).

[166] 47 C.F.R. § 69.5(b).

[167] Petition for Declaratory Ruling that AT&T's Phone to Phone IP Telephony Services are Exempt from Access Charges, Order, FCC 04-97, n.92 (rel. April 21, 2004).

[168] *See, e.g.,* MTS and WATS Market Structure, Third Report and Order, 93 FCC 2d 241 (1983) (adopting Rule 69.5), *affirmed sub nom* Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984); Stephens Report, 13 FCC Rcd. at 11,511-12, 11,523-24 ¶¶ 26, 44-46.

[169] Hunt Direct, p. 70-71 citing to Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges, First Report and Order, 12 FCC Rcd. 15,982, 16,133 ¶ 344 (1997) ("Access Charge First Report and Order").

[170] *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, 16 FCC Rcd. 9151, 9166 ¶ 32 (2001) ("ISP-Bound Traffic Remand Order").

[171] See WorldCom Inc. v. FCC, 288 F.3d 429 (D.C. Cir. 2002) ("Worldcom").

251(b)(5) applies to the exchange of all traffic between an ILEC and another telecommunications carrier, such as Level 3.[172]

Next, Level 3 argues that the FCC rules also prohibit an ILEC from assessing access charges on an interconnected CLEC that serves an IP-enabled information services provider – even if the ILEC believes that the IP-enabled services provider should be paying access charges. In support, Level 3 points to the FCC's recent AT&T Declaratory Ruling, wherein the FCC found that AT&T was an interexchange carrier with respect to certain telephone calls that originated and terminated in circuit-switched format.[173] Although the FCC found that an ILEC may assess access charges against AT&T as an interexchange carrier, the FCC noted that an ILEC may not assess access charges against a CLEC as a means of assessing charges against the interexchange carrier.[174] Level 3 argues that by the same token, an ILEC may not assess access charges against a CLEC serving an information service provider, even if the ILEC believes that the information service provider is an interexchange carrier.

Also, Level 3 notes that SBC's attempt to impose *intra*state access charges on IP-Enabled services traffic is improper because, as SBC itself has argued before the FCC, "IP-enabled services are indivisibly *inter*state in nature."[175] As SBC has acknowledged, IP-enabled services are jurisdictionally interstate because such services defy geographic categories.[176] Further, from a technical and operations perspective, it is currently impossible to separate IP-enabled traffic into interstate and intrastate components for jurisdictional purposes.[177] Indeed, SBC has observed that "it would be nonsensical, as well as impractical and cumbersome, to develop regulations for IP platform services that hinge on the physical location of the sender or recipient of those services."[178] In light of SBC's admission that such a project would be "nonsensical, as well as impractical and cumbersome", the Commission should reject SBC's proposed terms.

---

[172] *See* ISP-Bound Remand Order, 16 FCC Rcd at 9165-66 (¶ 31).

[173] *See* Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, Order, 19 FCC Rcd. 7457, 7457 ¶ 1 (2004) ("AT&T Declaratory Ruling").

[174] *See id.* at 7471 n.92 ¶ 23 ("To the extent terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers and not against any intermediate LECs that may hand off the traffic to the terminating LECs, unless the terms of any relevant contracts or tariffs provide otherwise.").

[175] IP-Enabled Services, WC Docket No. 04-36, Reply Comments of SBC Communications, Inc. at 8 (filed July 14, 2004) (emphasis added).

[176] *See* SBC IP NPRM Comments at 25-33.

[177] *See* Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, Memorandum Opinion and Order, 19 FCC Rcd. 3307, 3323 ¶ 24 (2004) ("Pulver Order").

[178] SBC Petition at 39.

Finally with respect to compensation for IP-Enabled Traffic, Level 3 argues that, by allowing SBC to inappropriately impose access charges on that traffic, this Commission would discriminate against Level 3 and stifle local competition. In support, Level 3 notes that SBC does not charge access charges to its "end user" customers that are ESPs. However, SBC does seek to impose access charges to Level 3 for the same traffic Thus, under SBC's proposal, a call from an SBC-served customer to a neighbor who subscribes to a cable-based IP-enabled service would require the cable company to pay SBC an originating access charge.[179] If that cable-based IP-enabled services customer subscribed to a circuit-switched CLEC service instead, SBC would owe the circuit-switched CLEC reciprocal compensation for the exact same call.

Level 3 notes that the impact of this arbitrary distinction is substantial. FCC statistics show that, in 2000 – the last year for which complete, actual data is available – National Exchange Carrier Association reported that almost 80% of all traffic was local in nature.[180] Thus, almost 80% of all traffic in 2000 was subject to cost-based reciprocal compensation. Under SBC's scheme proposed in this proceeding, an IP-enabled service provider with the same mix of local and toll traffic as described above (i.e., 80% local) would pay access to SBC for every minute of traffic that SBC originated, *including the 80% of traffic that was local*! By contrast, if that IP-enabled service provider were instead a circuit-switched provider, SBC would pay the CLEC reciprocal compensation for the 80 percent of traffic that is local, and the CLEC would pay SBC nothing for originating that traffic. Thus, under SBC's proposal, IP-enabled service providers would face a severe, yet unnecessary, anticompetitive disadvantage when providing the vast majority of their services—a disadvantage that the FCC has already banned in its reciprocal compensation rules.[181]

Further, Level 3 argues that SBC's proposal stunts innovation and conflict with the FCC's efforts to transition to a uniform intercarrier compensation regime. 47 U.S.C. § 230(b)(2) states that:

> It is the policy of the United States . . . to preserve the vibrant and competitive free market that exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.

---

[179] *See* Petition of SBC Communications Inc. for a Declaratory Ruling, WC Docket No. 04-29, at 39 n.76 (filed Feb. 5, 2004) ("SBC Petition") ("[W]hen IP platform services originate as circuit-switched traffic on the PSTN (and terminate in IP) or, after originating in IP format are converted to circuit-switched traffic and terminate over the PSTN, there is no reason that intrastate access cannot and should not be taken into account in the assessment of intercarrier compensation.").

[180] Hunt Direct, p. 77 citing to Table 8.3, "Dial Equipment Minutes Summary," Universal Service Monitoring Report 2003, FCC Docket No. CC 98-202, at 8-6 (rel. December 22, 2003).

[181] *See* 47 C.F.R. 51.703(b) ("A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.").

Applying access charges instead of the reciprocal compensation regime, as SBC suggests, subverts Congress's express goal of encouraging IP-based innovation. Because the FCC is working to adopt a single unified intercarrier compensation regime that would not require geographic specificity,[182] SBC's proposal subjects IP-enabled services to two unnecessary and expensive regime changes in short order—first departing from the *status quo* (reciprocal compensation) to the access charge regime, and then, thereafter, reverting back to a uniform regime.

Level 3 provides additional policy reasons to illustrate the importance of applying intercarrier compensation rather than access charges for IP-Enabled traffic including:

1. Level 3 would never be able to viably compete against SBC because its costs of providing the same service are artificially high due to SBC's imposition of the access charges – forcing Level 3 to either charge its customers higher charges or eat the cost-differential from its profit margins. In either event, Level 3 would face an uneven competitive field due to artificial costs adopted by this Commission.

2. Because both SBC and Level 3 agree that it is not possible to track the geographic end point of the IP end of an IP-enabled service, it does not make sense to force IP-Enabled service providers like Level 3 to develop the capability to do so at a time when the FCC is considering shifting the access charge system to a unified intercarrier compensation system that would not require tracking the geographic end point of the IP end of a call. Forcing Level 3 to undergo the considerable costs associated with developing a system the even SBC admits does not exist places an artificial and unnecessary pressure on Level 3's retail rates.

The following are Level 3's findings on the IP-Enabled Services Traffic Intercarrier Compensation provisions of the parties Interconnection Agreement.

SBC acknowledges that IP-Enabled traffic is interstate in nature, and that IP-enabled services that either begin or end on an IP network are interstate information services. Notwithstanding this fact, SBC is attempting to convince this Commission to adopt its proposed language in IC Appendix Section 16.1 that imposes Switched Access charges on any IP-Enabled Traffic. SBC cannot explain this disparity in positions between the FCC and this Commission.

Section 251(b)(5) — the Act's reciprocal compensation provision — applies to all telecommunications traffic unless that traffic is carved-out by Section 251(g).[183] As the

---

[182] *See Developing a Unified Intercarrier Compensation Regime,* Notice of Proposed Rulemaking, 16 FCC Rcd. 9610 (2001).

[183] See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, 16 FCC Rcd. 9151, 9166 ¶ 32 (2001) ("ISP-Bound Traffic Remand Order").

D.C. Circuit explained in 2002, Section 251(g) cannot function as a "carve-out" with respect to IP-Enabled services traffic because there was no pre-1996 rule governing the exchange of such traffic between LECs.[184] For that reason, the Interconnection Agreement should not contain terms and conditions that attempt to categorize IP-Enabled traffic, or that governs the conditions for the compensation of IP enabled traffic. As such, Level 3 encourages the Commission to adopt Sections 3.2-3.4.5 of Level 3's proposed agreement, and reject SBC's proposed terms in Section 16.1.

This issues is closely related to IC Issue 2(a-c) above, and therefore, Level 3 herein incorporates the same arguments. IP-Enabled Traffic should not, and indeed cannot, be classified by the physical location of the calling and called parties. As SBC admits to the FCC in its Reply Comments in FCC Docket No. 04-36, there is not a technical manner at present to allow for any carrier to track the jurisdictional nature of IP-Enabled Traffic. In light of the fact that SBC's proposal in Section 16.1 of the IC Appendix is not even technically feasible, it must be rejected, and Level 3's more rational, and technically feasible, approach of using the originating and terminating NPA-NXX should be adopted, as is industry custom. The Commission should adopt Level 3's language in IC Appendix Sections 3.2.1.3, 3.2.2, 3.2.2.1, and 3.2.2.2.

This issues is closely related to IC Issue 2(a-c) above, and therefore, Level 3 herein incorporates the same arguments. It cannot be disputed that an IP-Enabled call requires a net protocol conversion from TDM to IP, or vice versa. As detailed in the discussion above, the FCC has discussed and relied upon this point in recent IP-related investigations, and should be acknowledged in the Agreement. As such, the Commission must adopt Level 3's language in IC Appendix 3.2.1.3.

In the event that the Commission determines it appropriate to include IP-Enabled Traffic terms in the Agreement, Level 3 proposes the common-sense approach to have it insert into the SS7 call setup message an indicator identifying the traffic as originating as an IP-Enabled call on Level 3's network. By so doing, it will allow the Parties to identify any traffic that originates on the Level 3 network, and will assist in tracking and billing.

For purposes of ensuring proper intercarrier compensation for IP-Enabled Traffic, Level 3 also proposes the use of allocators to determine the appropriate jurisdictional mix of traffic carried over the interconnection facilities. Such allocators are a standard industry practice, used by both SBC and Level 3 in the course of tracking traffic. For instance, Level 3 proposes that it be obligated to provide SBC with a Percent of IP Usage Allocator to identify the percentage of traffic that is in fact originating from an IP customer. This PIPU allocator will be based upon Level 3's actual and verifiable records of IP-originated traffic. In other words, SBC will be able to track and verify the amounts of IP-originated traffic that Level 3 asserts in any given time period.

---

[184] *See* WorldCom Inc. v. FCC, 288 F.3d 429 (D.C. Cir. 2002) ("Worldcom").

From Level 3's perspective, this approach will benefit both SBC and Level 3. SBC's resistance to such an SS7 identifier confuses Level 3, in light of the benefits it will provide for purposes of intercarrier compensation. In light of the common-sense approach that Level 3 recommends and the benefits received through the use of an SS7 identifier and the PIPU allocator, the Commission should adopt its language in IC Appendix Section 3.2.2.3, 3.2.2.4, 3.2.2.4.1, 3.2.2.4.2, 3.2.2.4.3, and 3.2.2.5.

Level 3 argues that SBC should not be able to force Level 3 into building out a separate FGD network just so that it can track and bill Level 3 for IP-Enabled Traffic. From a common sense perspective, it does not make any sense to force Level 3 to go through the crushing expense of building out this network, when the FCC currently has before it several proceedings investigation the appropriate manner in which the route such traffic. Before forcing Level 3 to undergo expensive and time-consuming build out, the Commission should allow the FCC the opportunity to determine the appropriate manner in which to handle this traffic.

This Commission has previously considered this issue, adopting findings consistent with Level 3's proposal here. The Commission has held that, consistent with the FCC's Local Competition Order:

> It appears to the Commission that economic entry into the market requires that *Sprint be permitted to use its existing trunks for all traffic whenever feasible. Sprint has committed to provide accurate, auditable billing records.* Moreover, there are ways around the connection problems, as reflected by Suzanne Springsteen's admission that Ameritech Michigan can put local and non-local on the same trunk. *The problems for Ameritech Michigan appear to be billing and measurement problems, which can be reasonably resolved through establishing percentage of use factors*.[185]

This is the essence of what Level 3 has proposed in this arbitration – use the allocators to address the billing concerns of SBC, and allow Level 3 to provide auditable records upon which those allocations can be verified.

This issues is closely related to IC Issue 2(a-c) above, and therefore, Level 3 herein incorporates the same arguments. Level 3 proposes that the Commission not establish any rate of compensation for the exchange of IP Enabled traffic. The Commission should reject SBC's Section 16.1, and not adopt Level 3's Section 3.2.3.1. However, if the Commission is compelled for whatever reason to establish a rate of compensation for the exchange of IP enabled traffic, it should adopt the rate of $0.0007, which is the rate of compensation that SBC elected to receive when it opted into the ISP

[185] Order Approving Arbitration Agreement with Modifications, In the matter of the application of Sprint Communications Company, L.P. for arbitration to establish an interconnection agreement with Ameritech Michigan, Case No. U-11203, pp. 4-5 (1997) ("*Sprint Arbitration Order*").

Remand Order. When the FCC releases its expected intercarrier compensation revisions addressing IP-Enabled Traffic, the parties can negotiate the terms and use the Change in Law provisions of the agreement to incorporate those findings.

This issues is closely related to IC Issue 2(a-c) above, and therefore, Level 3 herein incorporates the same arguments. Level 3 proposes definitions of IP-Enabled Traffic and Circuit Switched Traffic that are derived from FCC Orders and regulations, namely the FCC's recent *AT&T IP Order*.[186] In that order, the FCC found that service that have the following characteristics is not "Information Services" traffic:

(1) the carrier holds itself out as providing voice telephony or facsimile transmission service;

(2) he Carrier does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched telephone network;

(3) the Carrier allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and

(4) the Carrier transmits customer information without net change in form or content.[187]

The FCC held that "this type of phone-to-phone IP telephony lacks the characteristics of an information service and bears the characteristics of a telecommunications service." Level 3's language in IC Appendix Sections 3.3, 3.3.1, 3.3.2, 3.3.2.1, 3.3.3, 3.4, 3.4.1, 3.4.2, 3.4.3, 3.4.4, 3.4.4.1, and 3.4.5 incorporate this distinction, consistent with the FCC's holdings, and should be incorporated into the final agreement.

(2) SBC

Voice over Internet Protocol ("VoIP") describes a voice communication that "traverses at least a portion of its communications path in an IP packet format using IP technology and IP networks." Access Avoidance Order, ¶ 3. [188]

SBC proposes a sensible way to address these new services: essentially, SBC proposes that VoIP be treated like all other traffic, consistent with the FCC's existing

---

[186] Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephone Services are exempt from Access Charges, WC Docket No. 02-361, FCC 04-97 (rel. April 21, 2004)

[187] *Id.*, ¶ 8.

[188] Order, In re Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, WC Docket No. 02-361, 19 F.C.C. Rcd. 7,457 (FCC rel. April 21, 2004) ("Access Avoidance Order").

rules, unless and until the FCC changes those rules. SBC's proposed language, consistent with the FCC's current regulations, provides that two types of interexchange VoIP traffic (called PSTN-IP-PSTN traffic and IP-PSTN traffic) (1) must be terminated over the same feature group access trunks used for other interexchange (*e.g.*, long distance) traffic and (2) remain subject to the same access charges that generally apply to other interexchange traffic, when that VoIP traffic originates and terminates in different exchanges.

Level 3 asserts that its proposed language, rather than SBC's, preserves the status quo with respect to VoIP traffic, but that is not the case. Level 3's proposal would radically alter existing trunking and compensation mechanisms so that it could use IP-based services to engage in access charge arbitrage and avoid paying lawful compensation for this traffic. In particular, Level 3 proposes adoption of a new intercarrier compensation regime subjecting all VoIP traffic to a reciprocal compensation rate of $0.0005 per minute, and exempting all such traffic from access charges, regardless of the locations of the calling and called parties, and regardless of the originating and terminating NPA/NXXs – that is, even where the calling and called parties are located in different exchanges within the State or even in different states. The issue here (as Level 3 agrees) is what federal law currently requires. Federal law currently requires access charges for interexchange traffic and does not subject such traffic to reciprocal compensation under section 251(b)(5), and that law makes no distinction and contains no limitations based on the technology used to deliver traffic to or from the PSTN. Therefore, Level 3's proposal is inconsistent with the FCC's regulations and should be rejected.

Moreover, the Commission does not have the discretion in this proceeding to rewrite section 251(b)(5) of the 1996 Act or to create a new exemption from the FCC's existing access charge regime for VoIP interexchange traffic that terminates on the PSTN. Section 251(g) of the 1996 Act freezes the access charge rules for interexchange traffic that were in effect as of the enactment of the 1996 Act, "until such restrictions and obligations are explicitly superseded by regulations prescribed by the [FCC] after such date of enactment." 47 U.S.C. § 251(g). As explained above, those pre-existing FCC rules require the application of access charges to both PSTN-IP-PSTN and IP-PSTN traffic, and thus those rules must continue to apply until expressly superseded by the FCC. While the FCC is currently considering possible revisions to existing access charge obligations with respect to VoIP traffic in its IP-Enabled Services NPRM, until the FCC adopts such revisions, the parties' contract must reflect the status quo, which SBC's proposed contract language does – and which Level 3's proposed language emphatically does not.

(3) Staff

The threshold question with respect to Issue IC-2 is whether or not the Commission should, in this arbitration, determine rates, terms, and conditions specifically applicable to the exchange of IP-PSTN "VoIP" traffic. The answer, according to Staff, is unequivocally no. Staff Init. Br. at 13.

The Staff points out that Level 3 has a pending forbearance petition before the FCC that must, according to federal statute, be decided by March 22, 2004.[189] The IP-PSTN issues in this proceeding, including Issue IC-2, require the Commission to determine the proper application of FCC rules and regulations, the same issues placed before the FCC in the pending forbearance petition. Thus, the determinations by the FCC in response to Level 3's petition will determine the IP-PSTN "VoIP" issues presented by the parties to the Commission in this proceeding.[190] And, even if the Commission were inclined to establish rules in the interim, the FCC has preempted it from doing so. Staff Init. Br. at 13.

Staff recommends the Commission affirmatively decide not to resolve IP-PSTN "VoIP" issues in this proceeding. In order to implement this decision Staff recommends that the Commission reject Level 3's proposed language for Appendix Intercarrier Compensation Section 3.2. SBC's proposed language for 16.1 should be accepted, but should revised to specifically indicate that it does not apply to IP-PSTN "VoIP" traffic. If Staff's recommendation regarding this threshold issue is accepted then the Commission would not be required to address any of the subissues presented by Level 3 or SBC within the framing of Issue IC-2. In accepting this recommendation, the Commission should clarify that it is expressly declining to make a determination regarding the rates, terms, and conditions for the exchange of IP-PSTN VoIP traffic in this proceeding. Specifically the Commission should clearly state that the absence of inclusion of IP-PSTN VoIP traffic from any section of the Appendix Intercarrier Compensation means that such traffic is not, because of any arbitration decision made in this proceeding by the Commission, subject to rates, terms, and conditions contained therein. If and when the FCC makes a determination regarding intercarrier compensation for IP-PSTN traffic, the parties can, if appropriate, update the agreement to reflect such determinations. Staff Init. Br. at 13-14.

b) Analysis and Conclusions

Level 3 IC-2(a). Level 3's preferred outcome here is that the parties' ICA "contain no provisions that would specifically set a rate of compensation for IP-Enabled traffic."[191] Level 3 Init. Br. at 63. Alternatively, and only if Level 3's preferred outcome is not selected, Level 3 proposes its own terms and conditions for IP-Enabled traffic (Section 3.2), under which, *inter alia*, such traffic would be subject to reciprocal compensation. In contrast, SBC proposes language that would explicitly treat IP-Enabled traffic as switched access traffic (except when the end-points of a call were within the same local calling area), subject to access charges.

---

[189] Order, ¶ 5, In the Matter of: Petition of Level 3 Communications LLC for Forbearance Under 47 U.S.C. Section 160(c) from Application of Section 251(g) of the Communications Act of 1934, as Amended, the Exception Clause of Section 51.701(b)(1) of the Commission's Rules, and Section 66.5(b) of the Commission's Rules, DA 04-3323, WC Docket No. 03-266 (rel. October 21, 2004).

[190] Staff Exhibit 1.0 at 5-6.

[191] Accordingly, Level 3 recommends rejection of SBC's proposed Section 16.1 in its entirety.

Staff recommends that the Commission make no decisions regarding IP-Enabled traffic beyond requiring the ICA to identify it "as a separate class of traffic that is not at present subject to any rates, terms and conditions ordered by the Commission for inclusion either directly or indirectly in the parties' agreement." Staff Rep. Br. at 26. Staff articulates two reasons. First, it maintains – correctly – that the FCC asserted preemptive control of IP-Enabled services in the recent Vonage Order. The FCC declared that *it*, "not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DjgitalVoice [Vonage's IP-Enabled service] and other IP-enabled services having the same capabilities."[192]

That begs the question of whether Level 3's IP-enabled services are like Vonage's. The FCC observed that Vonage's DigitalVoice included VOIP, a term the FCC used "generally to include any IP-enabled services offering real-time, multidirectional voice functionality, including, but not limited to, services that mimic traditional telephony."[193] VOIP is the essential IP-enabled service Level 3 will offer here. Furthermore, the FCC stated, "to the extent other VOIP services are not the same as Vonage's but share similar basic characteristics, we believe it highly unlikely that the [FCC] would fail to preempt state regulation of those services to the same extent."[194] The FCC also identified specific characteristics of Vonage's service (the need for specialized customer premises equipment (beyond a conventional phone)[195], and the ability to originate and terminate calls from any location[196]) that Level 3's service will also feature. We conclude that the foregoing principles and common characteristics make Level 3's IP-enabled services like Vonage's. Therefore, the authority to determine the terms of conditions of those services lies exclusively with the FCC.

Of course, this Commission does have the authority - indeed, the duty - to order the parties to comply with FCC directives, as we do elsewhere in this arbitration Decision (and have done in other arbitrations). However, directives regarding IP-enabled services have yet to be formulated, which brings us to Staff's second basis for urging a hands-off approach to IP-enabled services - the FCC's ongoing investigation of such services, including both a proceeding specific to Level 3 (the Level 3 Forbearance Petition) and an industry-wide rulemaking. According to Staff, the Level 3 Forbearance Petition will resolve the particular IP-Enabled Traffic issues presented here. Additionally, Staff emphasizes, the FCC is statutorily obligated to complete that proceeding by March 22, 2005, which, in Staff's view, will closely follow (or even precede) our approval of the ICA being arbitrated in this case.

---

[192] In the Matter of Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-0211, Order, ¶1, rel. Nov. 9, 2004.

[193] *Id*., ¶4, fn. 9.

[194] *Id*., ¶1.

[195] *Id*., ¶¶6 & 32.

[196] *Id*., ¶¶9 & 32.

The Commission agrees that it would be futile, inefficient and disruptive, as well as legally improper under the Vonage Order, for us to decide, at this point in time, the terms and conditions that will govern the exchange of IP-Enabled services between the carriers. Our authority has been preempted, there are no clear FCC rules to enforce and the preempting federal agency is examining both the specific questions presented here and the pertinent services generally. Further, even if we were to take action, based on our construction of, say, state law or peripherally related FCC orders, the imminent FCC resolution of the Level 3 Forbearance Petition might well unravel any regulatory matrix we created (assuming we could even approve an ICA before the FCC acts), disrupting the parties' operations. Since Level 3 is apparently not yet offering IP-enabled services[197], and does not indicate when it will start, the far superior course is to await guidance from the FCC.

That said, we concur with Staff that the ICA must expressly and unequivocally state that IP-enabled services are excluded from the ICA and that none of the ICA's rates, terms and conditions apply directly or indirectly to such services. When the FCC issues relevant decisions, such exclusionary provisions in the ICA may need to be revised, pursuant to the ICA's change-of-law provisions, in order to comply with the FCC.

Level 3 IC-2(b). The Vonage Order has clearly and completely determined that IP-Enabled traffic is interstate traffic for regulatory purposes, even though it includes, in fact, some amount of intrastate traffic[198].

Level 3 IC-2(c)-(j). Our resolution of Level 3 sub-issue IC-2(a) subsumes each of these sub-issues, rendering additional rulings unnecessary.

Level 3 IC-2(k). For the reasons set forth in our resolution of Issue DEF-3 and Level 3 Issue ITR-18(d), the Commission does not approve a definition for "Circuit-Switched Traffic" for the parties' ICA.

SBC IC-2. The carriers agree that "IP-in-the-middle" traffic is subject to access charges whenever such charges would otherwise apply. IP-PSTN traffic is removed from the purview of the ICA by our resolution of Level 3 IC-2(a), above.

3. IC-3 (Level 3)(3) Should SBC's proposed definition of "Section 251(b)(5)" restrict the categories of traffic to only the categories of traffic identified by SBC's proposed language.

(SBC)(3) Should the Agreement define Section 251(b)(5) traffic to mean calls in which the originating end user and the

[197] Tr. 272 (Wilson) & 297 (Gates).

[198] Vonage Order, ¶18.

terminating end user are both physically located in the SBC Local Exchange area or common mandatory local calling area?

a) Parties' Positions and Proposals

(1) Level 3

This issues is closely related to IC Issues 1 and 2 above, and therefore, Level 3 herein incorporates the same arguments. SBC is attempting to unlawfully restrict the scope of traffic to which Section 251(b)(5) compensation regimes apply. Under the Act, Section 251(b)(5) applies to all telecommunications traffic, irrespective of where the calling and the called parties are physically located. By its very terms, Section 251(b)(5) applies to "the transport and termination of telecommunications." To this clear definition, SBC attempts to impose a geographic standard that is not within the scope of Section 251(b)(5), and attempts to presume the direction of federal law that will be expressed in the upcoming FCC ISP Remand Order or the FCC's investigations regarding IP Enabled services.

SBC's attempts to craft a definition of this "Section 251(b)(5) Traffic" is directed towards presupposing the results of the FCC's deliberations in the ISP Remand Order. Level 3 proposes that it would be best if the parties and this Commission wait until the FCC has released its ISP Remand Order, which is expected in the very near future. As such, the Commission should reject SBC's attempts at preempting the FCC's deliberations in the upcoming ISP Remand Order, and reject SBC's language in IC Appendix Section 3.2.

(2) SBC

IC Issue 3 concerns SBC's proposal to use the defined term "Section 251(b)(5) Traffic" to describe the traffic that is subject to reciprocal compensation under Section 251(b)(5) of the 1996 Act. Level 3 opposes use of this terminology, and instead proposes to use the term "circuit switched Local Traffic (intra exchange and mandatory EAS)" to describe traffic subject to reciprocal compensation under Section 251(b)(5). Appendix IC, L3 § 5.2. Level 3's proposal to classify traffic subject to reciprocal compensation as "circuit switched Local Traffic" is inconsistent with federal law. In the ISP Remand Order, the FCC expressly rejected the "local" terminology, and instead used the term 'section 251(b)(5) traffic' to refer to traffic subject to reciprocal compensation." Virginia Arbitration Order, ¶ 315. *See* ISP Remand Order, ¶¶ 8, 25, 89, 98 (using term "section 251(b)(5) traffic").

Instead of inappropriately classifying traffic as "Local," SBC proposes to use the term "Section 251(b)(5) Traffic" to describe the traffic subject to Section 251(b)(5). SBC's proposal is in conformity with the FCC's ISP Remand Order, and should be adopted.

Level 3 also opposes SBC's proposed definition of Section 251(b)(5) Traffic insofar as that definition is limited to calls where the originating and terminating end

users are physically located in the same local exchange area (or exchange areas "within the same common mandatory local calling area"). SBC § 3.2. Level 3 asserts that instead "the rating of a call for purposes of defining the appropriate intercarrier compensation for circuit switched traffic" should be "determined based on the NPA-NXX of the calling and called parties," regardless of their geographic locations. Level 3's position should be rejected.

A call that originates in one local exchange area in a LATA and terminates in another local exchange area in the same LATA is an intraLATA toll call, which is not subject to reciprocal compensation. *See* 47 C.F.R. § 51.701(b)(1). Typically, the NPA-NXX of any given telephone number (for example, 317-242 in the phone number (317) 242-1234) is uniquely associated with the local exchange area in which calls from that number originate. Consequently, the network can typically identify a "local" call, *i.e.,* a call that originates and terminates in a single local exchange area, by matching the NPA-NXX of the calling party with the NPA-NXX of the called party. Likewise, the network can typically identify an intraLATA toll call based on the NPA-NXX's of the calling party and the called party. Some customers obtain "FX" service, which gives them NPA-NXX's that are associated with a local exchange area different than the one from which they actually originate calls. Level 3's position is that if a call to such an FX customer "looks" local to the network, it should be treated as local by being made subject to reciprocal compensation, even though the call actually passes from one local exchange area to another and thus – based on the path it travels – would otherwise be treated as an intraLATA toll call. Level 3 is wrong.

A call is an intraLATA toll call because it travels from one local exchange area into another local exchange area in the same LATA, not because of the NPA-NXX's of the calling party and the called party. To be sure, the NPA-NXX's have traditionally been used, and can generally still be used, to *identify* which calls are local (and therefore subject to reciprocal compensation) and which are not. But what actually matters is the actual geography of the call – and if the NPA-NXX's make a call that is actually intraLATA "look" local, that does not make it a local call.

Section 251(b)(5) requires reciprocal compensation only for traffic between parties located in the same local exchange. Traffic between parties located in different local exchanges is interexchange traffic, and is subject to intrastate and interstate access tariffs, not reciprocal compensation. In short, Section 251(b)(5) "does not mandate reciprocal compensation for 'exchange access, information access, and exchange services for such access.'" ISP Remand Order, ¶ 34. This exclusion applies to "all traffic" "that travel[s] to points – both interstate and intrastate – beyond the local exchange," and preserves both the interstate and intrastate "access regimes applicable to this traffic." *Id.* ¶ 37.

SBC's proposed contract language properly preserves the distinction between traffic "that travel[s] to points . . . beyond the local exchange" and traffic that does not travel beyond the local exchange. Level 3's proposal to rate traffic solely by NPA-NXX, on the other hand, does not properly incorporate this distinction. SBC's proposal should be adopted, because governing federal law requires reciprocal compensation

under section 251(b)(5) only for traffic that does not travel outside the local exchange area. And in order to determine whether a call travels outside the local exchange area, one must look beyond the telephone numbers (the NPA NXXs) to the actual geographies involved, as SBC proposes.

(3) Staff

Here again, the parties offer competing proposals to classify traffic for purposes of intercarrier compensation. Again, as indicated above, according to the Staff the utility of these classifications will depend on how well the distinctions in traffic identified by these classifications match the distinctions in compensation levels appropriate for the respective traffic types. Staff Init. Br. at 14.

In this instance, the fundamental dispute is whether Section 251(b)(5) traffic should be defined according to the geographic location of the calling and called parties, or, alternatively, based upon the calling and called parties phone numbers – in essence whether VNXX or FX-like traffic should be classified separately from Section 251(b)(5) traffic. As Staff noted above, the Commission has consistently distinguished Section 251(b)(5) traffic from VNXX or FX-like traffic.[199] As a classification matter, separately classifying Section 251(b)(5) and VNXX or FX-like traffic does not prevent either the Commission or the FCC from prescribing intercarrier compensation rules for VNXX or FX-like traffic that are similar or identical to intercarrier compensation rules applicable Section 251(b)(5) traffic. Adding this distinction does, however, permit either the Commission or FCC to prescribe separate and distinct rules for VNXX or FX-like and 251(b)(5) traffic. Adding the distinction (along with a specific VNXX or FX-like passage as proposed by SBC with respect to Issue IC-11) identifies -- explicitly rather than implicitly -- the appropriate intercarrier compensation rates applicable to VNXX or FX-like traffic. Staff Init. Br. at 14-15.

Thus, Staff recommends the Commission accept SBC's proposed language for Appendix Intercarrier Compensation Section 3.2.

b) Analysis and Conclusions

The Commission rejects SBC's proposal to classify certain telecommunications traffic as "Section 251(b)(5) Traffic," which appears designed to align Section 251(b)(5) with SBC's defense of its access revenues, rather than to craft competitively neutral nomenclature for the parties' ICA. As we said in connection with Issue DEF-18, above, subsection 251(b)(5) of the Federal Act simply establishes the duty of all local exchange carriers to create reciprocal compensation arrangements for "telecommunications." It does not define or otherwise identify those "telecommunications" (and, as noted in connection with DEF-18, the definition of that term in subsection 153.43 of the Federal Act generically describes telephonic communication, and does not identify traffic subject to reciprocal compensation).

---

[199] AT&T Arbitration Decision at 123-124.

The parties' real disagreement concerns whether the traffic subject to subsection 251(b)(5) reciprocal compensation (and, for that matter, the traffic subject to access charges) will be determined in the ICA by geography (SBC) or NPA-NXXs (Level 3). Thus, SBC's proposed Section IC 3.2 (which mirrors SBC's proposed definition in the GTC Definitions Appendix), defines "Section 251(b)(5) Traffic" as traffic between end-users physically located within the same SBC local exchange (or common mandatory local calling area). Level 3 does not propose an alternative version of Section IC 3.2, but maintains throughout this arbitration that intercarrier compensation should be determined by the assigned telephone numbers of the calling and called parties, irrespective of their geographic location. Consequently, each carrier defines the traffic that will be subject to reciprocal compensation (that is, traffic subject to the arrangements required by subsection 251(b)(5)) as the traffic that the carrier *wants* to be subject to reciprocal compensation. On its face, subsection 251(b)(5) does not pick the winner in this dispute. Reciprocal compensation under Section 251(b)(5) can be, but is not necessarily, associated with either geography or NPA-NXXs.

As we suggested in connection with DEF-18, the use of the term "Section 251(b)(5) Traffic" implies that SBC's proposed definition is manifestly required by the statute. The Commission does not agree and sees no reason to approve such a provocative and disputatious term here. We find it far more sensible and efficient, and closer to neutral, to identify traffic that *will be* subject to reciprocal compensation under the ICA, rather than the traffic that *is* reciprocal compensation traffic under the Federal Act (provided, of course, that the former is lawfully included among the latter).

There is no disagreement that the traffic traditionally known as "local" (a term SBC eschews, yet includes several times in its definition of "Section 251(b)(5) Traffic") is subject to reciprocal compensation. Therefore, that term should be used in the ICA. Alternatively, the parties can use the definition for the term "Telephone Exchange Service," as it appears in 47 CFR 153.46. As a statutory definition, it is beyond quarrel, and the service described there is unquestionably subject to reciprocal compensation. With regard to intercarrier compensation for the traffic categories that are central to the carriers' conflict (IP-enabled traffic and certain FX, FX-like and ISP-Bound traffic), the Commission makes substantive rulings elsewhere in this Arbitration Decision.

Finally, we note that our resolution of this issue is consistent with, and shares the underlying principles of, our resolution of Issue DEF-18.

4. IC-4 (Level 3)(a) Should Level 3 and SBC continue to exchange all types of Telecommunications Traffic over a single set of already constructed and fully operational interconnection trunks or should SBC be permitted to force Level 3 to construct unnecessary FDG trunks which will unjustifiably increase Level 3's provision of the next generation of voice services to business and residential customers?

(Level 3)(b) Should SBC be able to block the other's traffic without following the dispute resolution procedures in the event of a dispute over the jurisdictional nature or classification of traffic?

(SBC)(4) Is it appropriate for the parties to agree on procedures to handle Switched Access Traffic that is delivered over Local Interconnection Trunk Groups so that the terminating party may receive proper compensation?

a) Parties' Positions and Proposals

(1) Level 3

Each of these issues will be decided by the Commission in its deliberations related to the ITR Issues 1 and 2 discussed above. For consistency, the Commission should adopt language in response to these issues that comports with the determinations made related to the obligation to build out these additional trunking interconnections. Level 3 believes that a fair reading of the legal requirements, as well as a common sense approach to network design, should lead the Commission to agree with Level 3 that it is appropriate and efficient to carry multiple forms of traffic over single interconnection trunks. As such, adoption of Level 3's language in Intercarrier Compensation Appendix Sections 4.7-4.7.1 consistent with the Commission's determinations above.

(2) SBC

IC Issue 4 concerns the proper routing for interexchange traffic, including interexchange IP-PSTN and PSTN-IP-PSTN traffic. (SBC's position on this issue is also found under ITR Issue 18(b), which discussion is fully incorporated by reference herein.) Level 3 proposes that the parties exchange all "IP Enabled Services traffic over Local Interconnection Trunk Groups," even when such traffic is clearly non-local, but is interexchange traffic. Appendix IC, L3 § 4.7.2. SBC, on the other hand, proposes that all "Switched Access Traffic" (*i.e.,* interexchange traffic, including PSTN-IP-PSTN and IP-PSTN VoIP traffic) be routed over the trunk groups that have always been used for interexchange traffic. Level 3's proposal should be rejected.

Level 3's suggestion that all VoIP traffic should be treated as local traffic is contrary to federal law. Under the FCC's current intercarrier compensation regime, interexchange PSTN-IP-PSTN and IP-PSTN traffic is subject to the same access charges as all other interexchange traffic. Thus, interexchange PSTN-IP-PSTN and IP PSTN traffic should be routed over feature group trunk groups, as SBC proposes, and not local interconnection trunk groups, as Level 3 proposes, because local interconnection trunk groups are not intended for access traffic, and do not permit SBC to bill access charges. If Level 3 were allowed to use local interconnection trunk groups to route interexchange PSTN-IP-PSTN and IP-PSTN traffic, it would be able to evade tariffed switched access charges, would avoid paying the same rates as carriers who do not inappropriately attempt to avoid access charges, and would avoid paying proper compensation for use of SBC's local exchange carrier network. In the FCC's words, interexchange PSTN-IP-PSTN and IP PSTN calls "impose[] the same burdens on the local exchange as do circuit-switched interexchange calls," and thus "[i]t is reasonable that [Level 3] pay the same interstate access charges as other interexchange carriers for the same termination of calls over the PSTN." Access Avoidance Order, ¶ 15.

SBC also proposes language specifying the procedures to be used if a third party inappropriately delivers interexchange traffic over local interconnection trunk groups. Appendix IC, SBC § 16.2. In such a case, the terminating party may object in writing to the improper delivery, and both parties will work cooperatively to remove such traffic from the local interconnection trunk groups, with further recourse to the Commission in the absence of timely resolution of the problem. *See* Id. SBC's proposed language is lawful and reasonable, and should be adopted. Ensuring the proper delivery of interexchange traffic is essential in order to enable the parties to obtain proper terminating access charges associated with such traffic.

(3) Staff

With respect to this Issue, Level 3 proposes language that would address proper routing and dispute resolution as its relates to IP-PSTN "VoIP" traffic. The Staff finds that Level 3's recommended language with respect to IP-PSTN "VoIP" traffic should be rejected for the reasons explained in Issue IC – 2.

SBC offers a more generic proposal that would require the parties to work cooperatively to address instances in which traffic is being routed improperly according to the terms of the contract as a result of improper routing to either Level 3 or SBC by a third party. This, according to Staff, would correct, for example, instances in which third parties improperly identify circuit switched interstate interexchange voice traffic delivered to Level 3 and bound for SBC as local traffic rather than switched access traffic. Staff Init. Br. at 15-16.

Level 3's primary objection to this proposal is that it might prohibit the exchange of IP-enabled traffic. However, as explained above, the Staff recommends that Commission not address issues related to IP-PSTN VoIP traffic. Accordingly, Level 3's proposal can be remedied by requiring the parties to include language indicating that

the Section 16.2 does not apply to the exchange of IP-PSTN VoIP traffic. Staff Init. Br. at 16.

SBC's proposed language for Appendix Intercarrier Compensation Section 16.2 offers a reasonable approach to general traffic identification problems. Staff, therefore, recommends that SBC's proposed language be accepted, but modified to specify that it does not address IP-PSTN "VoIP" traffic. This recommendation more directly remedies the concerns expressed by Level 3 than does the proposal of Level 3. Id.

b) Analysis and Conclusions

As written, Level 3 Issue IC-4(a) poses the same substantive question as ITR-11. Our resolution of that/those issue(s) applies here as well. Insofar as this issue concerns IP-enabled services, our resolution of IC-2 excludes such services from the ICA.

Level 3 IC-4(b) and SBC IC-4. The Commission does not construe SBC's proposed Section 16.2 as a "self-help" provision. To the contrary, that section expressly contemplates this Commission's participation in dispute resolution. Accordingly, we approve SBC's Section 16.2, with the caveat that the term "Switched Access Traffic" will be defined only in the GTC Definitions Appendix, as modified by us in Issue ITR-18(c). The definitions of "Switched Access Traffic" in IC Section 16.1 and ITR Section 12.1 are eliminated (except as some of their identical text is moved to the Definitions Appendix).[200]

5. IC-5 (Level 3) Should ISP-Bound Traffic be identified as originating as a call that originates on the circuit switched network and terminates to an Internet Services Provider?

(SBC) Should the Agreement define ISP-Bound traffic to mean calls in which the originating end user and the terminating ISP are both physically located in the SBC Local Exchange Area or common mandatory local calling area?

a) Parties' Positions and Proposals

(1) Level 3

A subpart of the foregoing issues relating to the appropriate rate of compensation for IP enabled traffic is the question of what is the appropriate rate of compensation for traffic that originates from SBC's customers and terminates to an Internet Service Provider ("ISP") that is a customer of Level 3 (or a customer of Level 3's customer.) It is

[200] Also, to be consistent with our resolution of ITR-18(c), the conflicting definitions of "Local Interconnection Trunk Groups" in IC-16.1 & 16.2, like the parallel text in ITR-12.1 and 12.2, must be harmonized with the definition discussed in Issue DEF-10. Also, the term "Section 251(b)(5) Traffic" is excluded.

Level 3's position that all "ISP Bound" traffic is to be compensated at a rate of $0.0007 per minute of use pursuant to the terms of the FCC's April 21, 2001 ISP Remand Order[201], regardless of the physical location of the ISP.

SBC's proposed contract terms request that a different arrangement known as "bill and keep" apply to some ISP-Bound traffic, namely those calls where the ISP is not physically located in the SBC customers' (the calling party) local exchange area, but is assigned a NPA-NXX that is associated with the local calling area of the SBC customer.[202] "Bill and keep" provides that each carrier bills its own customers for what ever services it may provide, and then "keeps" the revenue without the exchange of any compensation. Under this scenario, Level 3 would not receive compensation from SBC for the costs incurred by Level 3 in terminating SBC's calls. In addition, SBC proposes a series of compensation terms that relate to those circumstances when Level 3 uses SBC's unbundled local switching (ULS) network elements.[203]

Level 3's proposed terms take into account the existing federal rules and FCC decisions on ISP-Bound traffic. A single uniform rate of compensation for the exchange of all IP Enabled traffic (including VoIP and ISP-bound) at the rate of $0.0007 per minute of use.[204] In the event that the Commission chooses to establish a rate of compensation for the exchange of IP enabled (IP-TDM and TDM-IP) traffic (discussed above), then Level 3 requests that the Commission incorporate the ISP-Bound traffic rate of $0.0007 per minute of use, consistent with the FCC's ISP-Bound Remand Order, into Level 3's contract.

Level 3's proposed contract terms simplify the parties' Intercarrier Compensation appendix, particularly compared to SBC's Byzantine terms. Under Level 3's proposed contract certain traffic for which tariffs are already established (such as 8YY and toll traffic), would be exchanged under the parties' tariffs, everything else would be exchanged at a rate of $0.0007 This would include Circuit Switched (e.g. typical "local exchange traffic"), ISP-Bound (with no distinction made based on the geographic location of the callers), and IP enabled traffic.[205]

This Section of Level 3's brief will discuss the applicable law for the exchange of ISP-Bound Traffic. All ISP Bound Traffic must be exchanged at the rate of $0.0007.

In general, the parties agree that ISP-Bound traffic will be exchanged at the rate of $0.0007 if the calling party and the ISP are both physically located in the same local

---

[201] In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, Order on Remand, FCC 01-131, 16 FCC Rcd 9151, Order on Remand and Report and Order (April 21, 2001.)

[202] See SBC Proposed Intercarrier Compensation Sections 5.1; 7.2.

[203] SBC proposed IC Appendix Section 5.7.

[204] Level 3 Proposed IC Section 5.2.3.

[205] Or $0.0007 if the Commission does not establish a rate of IP enabled traffic.

exchange. The disputed portion of the ISP-Bound traffic provisions of the parties' agreement relates to the treatment of Foreign Exchange ISP-Bound, or VNXX ISP-Bound calls. In its proposed Section 3.3 SBC seeks to define "ISP-Bound" traffic to include only those circumstances where the SBC originating customer and the Level 3 ISP are physically located in the same SBC local exchange. In the circumstance where the ISP is not physically located within the exchange of the originating caller, SBC's proposed contract curiously provides that "bill and keep" be the ISP-Bound compensation arrangement.[206]

In its April 2001 ISP Remand Order, the FCC asserted exclusive jurisdiction over compensation rates for ISP-bound traffic.[207] In the ISP Remand Order, the FCC ruled that traffic to ISPs was excluded from the reciprocal compensation requirements of Section 251(b)(5) by operation of Section 251(g) of the Act.[208] Further, the FCC held that state commissions no longer had jurisdiction to address the rates of compensation for ISP-bound traffic.[209] Thus, the FCC has sole authority to address the rate of compensation for the exchange of ISP-bound traffic. The FCC was very specific in its conclusion that:

> Congress excluded from the "telecommunications" traffic subject to reciprocal compensation the traffic identified in section 251(g), including traffic destined for ISPs. Having found, although for different reasons than before, that the provisions of section 251(b)(5) do not extend to ISP-bound traffic, we reaffirm our previous conclusion that traffic delivered to an ISP is predominantly interstate access traffic subject to section 201 of the Act, and we establish an appropriate cost recovery mechanism for the exchange of such traffic.[210]

This ruling appropriately includes intercarrier compensation for all ISP-Bound traffic, including FX or VNXX ISP-Bound traffic.

---

[206] SBC proposed IC Appendix Section 7.2.

[207] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Intercarrier *Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order (rel. Apr. 27, 2001) ("ISP Remand Order") at ¶ 46; *remanded sub nom. WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert.* denied, 538 U.S. 1012 (2003). Although the U. S. Court of Appeals for the D.C. Circuit remanded the ISP Remand Order to the FCC for further consideration, the Court did not vacate the Order, leaving the federal compensation regime in place while the FCC deliberates the issue once again. Accordingly, even though the legal reasoning providing the authority for the FCC to promulgate its federal compensation regime has been rejected, the federal compensation regime itself remains intact and applies in this case.

[208] This aspect of the ISP Remand Order was rejected though not vacated by the D.C. Circuit in *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003).

[209] ISP Remand Order at ¶¶ 52, 82.

[210] *Id.*, ¶ 1.

Therefore, Level 3 requests that the Commission order SBC and Level 3 to exchange all ISP-Bound traffic at the rate of $0.0007 per minute of use.

According to SBC, FX traffic should not be classified as local calls subject to ISP-Bound compensation.[211] Rather, SBC imposes bill and keep for both voice and ISP-Bound FX traffic.[212] With respect to FX services, Level 3 explains that FX is a service that has been offered by phone companies for many years and allows an end user (generally a business) to appear to have a local presence when in fact their office is not in reality located in the same local calling area as an originating caller.[213] The customer pays for an arrangement (a special trunk or other facility) that connects them to a network that covers a LATA.[214] The customer is given a phone number in the local calling area so that end users in that local calling area can call them by dialing a local phone number.[215] Today, Internet Service Providers ("ISPs") use FX type configurations so consumers can make local calls to their ISP when they need dial-up access.[216] For instance, FX-like services allow ISPs to offer local dial-up internet access throughout the state, including in more remote, isolated areas.[217] FX calls are routed between networks the same as any other local call.

Level 3 notes that, from a networking perspective, SBC's routing obligations for the call is the same no matter where the FX customer is physically located.[218] Whether SBC terminates an FX call to Level 3 for termination across the street from the SBC customer, or 400 miles away, SBC's obligation is to exchange that call at the Level 3 POI.[219] Further, the evidence shows that the originating and terminating switch or gateway for that FX call will have no way of knowing the geographic physical location of the called party where the called party is an IP enabled customer.[220] For billing purposes, calling an NPA-NXX number that is assigned or "homed" to the ILEC's originating local switch, the end user views the call as a local call and there is not a toll charge assessed.[221]

Level 3 asserts that it would be clear reversible error for the commission to accept SBC's attempts to create a false distinction between alleged "locally" dialed ISP-

---

[211] McFee Direct, p. 18-19.

[212] McFee Direct, p. 19.

[213] Hunt Direct, p. 79-80.

[214] Wilson Direct, p. 62.

[215] Wilson Direct, p. 62; Hunt Direct, p. 81; McFee Direct, p. 17.

[216] Wilson Direct, p. 62.

[217] Hunt Direct, p. 81-82.

[218] Hunt Direct, p. 79-80.

[219] Wilson Direct, p. 62-63; Hunt Direct, p. 80..

[220] Wilson Direct, p. 62-63.

[221] Wilson Direct, p. 62-63.

Bound traffic and FX / VNXX ISP-Bound traffic. There is no such distinction in the rate of compensation under the FCC's ISP Remand Order. All traffic bound to an ISP must be exchanged at a rate of $0.0007, regardless of the geographic location of either the originating caller or terminating party. SBC opines that the geographic physical location of the originating or terminating caller should determine whether the FCC's ISP Remand Order governs the rate of compensation.[222] SBC is wrong because the FCC's orders do not distinguish "local" ISP-bound traffic from "non-local" ISP-bound traffic. In fact, in the ISP Remand Order, the FCC repudiated its earlier distinction between "local" and "non-local" for all traffic:

> This analysis differs from our analysis in the Local Competition Order, in which we attempted to describe the universe of traffic that falls within subsection [251](b)(5) as all "local" traffic. *We also refrain from generally describing traffic as "local" traffic because the term "local," not being a statutorily defined category, is particularly susceptible to varying meanings, and significantly, is not a term used in section 251(b)(5) or section 251(g)*.[223]

To Level 3, the ISP Remand Order makes clear that the federal compensation regime applies to *all* ISP-bound traffic: "We conclude that this definition of 'information access' was meant to include *all access traffic* that was routed by a LEC 'to or from' providers of information services, of which ISPs are a subset."[224] Nowhere does the ISP Remand Order limit its regime to "local" ISP-bound traffic.

Level 3's argues that its proposed contract terms are further supported in the very recent FCC Core Forbearance Order[225], which addressed Core's petition requesting the FCC refrain from enforcing the provisions of the ISP Remand Order. In summarizing its ISP Remand Order, the FCC stated that:

> 6. Its Growth Cap rules "imposed a cap on total ISP-Bound minutes for which a LEC may receive this [intercarrier] compensation equal to the total ISP-Bound

---

[222] Wilson Direct, p. 59. As noted by Mr. Wilson, there are a number of technical problems with the method that SBC is promoting, not the least of which is that circuit switches have no way of knowing the geographic location of the calling or called parties. Wilson Direct, p. 59-60. From a network perspective, the local switches know which numbers are local, route the calls properly, and bill accordingly. Id. A call that is made between two numbers assigned to a local calling is treated as a local call, no matter that the call ultimately terminates at a foreign exchange.

[223] ISP Remand Order at ¶ 34.

[224] ISP Remand Order at ¶ 44 (emphasis added).

[225] Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order, WC Docket No. 03171, FCC 04-241, (rel. October 18, 2004) ("Core Forbearance Order").

> minutes for which the LEC was previously entitled compensation, plus a 10 percent growth factor."[226] and,
>
> 7. Its New Market rules allowed two carriers to exchange traffic on a bill-and-keep basis if the two carriers were not exchanging traffic prior to adoption of the ISP Remand Order and the ILEC "has opted into the federal rate caps for ISP-Bound traffic".[227]

Again, the FCC did not draw a distinction between local and non-local ISP-Bound traffic. Rather, the FCC reiterated that the holdings of the ISP Remand Order applied to all ISP-Bound Traffic.

Further, Level 3 argues that the recent FCC's *Starpower* decision supports its positions. In that decision, the FCC confirmed that Verizon must pay intercarrier compensation on ISP-Bound VNXX traffic (rather than having Bill and keep, or having access charges apply to these calls.)[228] Finally, Level 3 points the Commission to the Virginia Arbitration Order, in which Verizon's contract terms were summarized as follows:

> Verizon objects to the petitioners' call rating regime because it allows them to provide a virtual foreign exchange ("virtual FX") service that obligates Verizon to pay reciprocal compensation, while denying it access revenues, for calls that go between Verizon's legacy rate centers. This virtual FX service also denies Verizon the toll revenues that it would have received if it had transported these calls entirely on its own network as intraLATA toll traffic. Verizon argues simply that "toll" rating should be accomplished by comparing the geographical locations of the starting and ending points of a call.[229]

The FCC rejected Verizon's attempts to impose a bill and keep regime for FX ISP-Bound traffic:

> We agree with the petitioners that Verizon has offered no viable alternative to the current system, under which carriers rate calls by comparing the originating and terminating NPA-NXX codes. We therefore accept the petitioners' proposed language and reject Verizon's language that would rate calls

---

[226] Core Forbearance Order, ¶ 9.

[227] Core Forbearance Order, ¶ 9.

[228] In re Starpower Communications v. Verizon South, 04-102, EB-00-MD-19, Order (rel. April 21, 2004.)

[229] FCC Virginia Arbitration Order at ¶ 286.

> according to their geographical end points. Verizon concedes that NPA-NXX rating is the established compensation mechanism not only for itself, but industry-wide. The parties all agree that rating calls by their geographical starting and ending points raises billing and technical issues that have no concrete, workable solutions at this time.[230]

Level 3 argues that, just as the FCC Competition Bureau rejected the ILEC's attempt to impose a bill and keep compensation regime for ISP-Bound FX Traffic, so too should this Commission. In fact, under the FCC's holdings in the ISP Remand Order mandating that only the FCC can establish intercarrier compensation rules for ISP-Bound traffic, the only manner in which the Commission can address the underlying issue raised in this arbitration is to adopt Level 3's proposal to apply a uniform rate of compensation for all traffic.

Level 3 further argues that SBC's handling of a "locally" dialed ISP-Bound call is no different than if the ISP is located across the country – SBC's obligation is to bring the call to the Point of Interconnection. Indeed, every call exchanged between SBC and Level 3 will be exchanged in exactly the same manner no matter if it is FX or not – SBC will transport the call from its switch to the Level 3 POI, and Level 3 will terminate that call to either the same local calling area or a different one. SBC incurs no additional costs for completing an FX or VNXX call than it would any other type of call terminated at the Level 3 POI.[231] Because SBC's costs to bring a call to the POI are the same regardless of the nature of the call, there is no economic justification for treating these calls differently from any other locally dialed call.[232]

Level 3 also provides the Commission with a series of other state Commission orders where the other commissions have reached conclusions similar to the Virginia Arbitration Order and also finding that the FCC has exclusive jurisdiction to address compensation for ISP-Bound Traffic.[233]

---

[230]FCC Virginia Arbitration Order at ¶ 301.

[231] Hunt Direct, p. 80.

[232] Hunt Direct, p. 80.

[233] Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, Case No. 2000-404, Order, at 7 (Ky. PSC Mar. 14, 2001); TDS Metrocom, Inc., Case No. U-12952, Opinion and Order (Mich. PSC Sept. 7, 2001), 2001 WL 1335639; Application of Ameritech Michigan to revise its reciprocal compensation rates and rate structure and to exempt foreign exchange service from payment of reciprocal compensation, Case No. U-12696, Opinion and Order (Mich. PSC Jan. 23, 2001); Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Michigan, Case No. U-12460, Opinion and Order (Mich. PSC Oct. 24, 2000); Petition of Coast to Coast Telecommunications, Inc. for arbitration of interconnection rates, terms, conditions, and related arrangements with Michigan Bell Telephone Company, d/b/a Ameritech Michigan, Case No. U-12382, Order Adopting Arbitrated Agreement (Mich. PSC Aug. 17, 2000); Complaint of Glenda Bierman against

The following are our specific findings on the ISP-Bound Services Traffic Intercarrier Compensation provisions of the parties Interconnection Agreement.

With respect to IC Issue 5, The Commission should adopt language that makes clear that ISP-Bound traffic is traffic that is originated over the circuit switched network, and terminated to an ISP customer of the other party. This definition is consistent with the FCC's orders and regulations related to ISP-Bound Traffic.

SBC, in its language in IC Appendix 3.3, imposes a requirement that ISP-Bound Traffic is only applicable in situations where the calling parties (i.e., end user and ISP) are physically located in the same local calling area. This requirement is not consistent with the FCC's ISP Remand Order, as neither the word "physical" nor "physically located" appear any where in the Order or the regulations adopted thereunder. In short, SBC creates new requirements that are not even considered under the applicable laws governing ISP-Bound Traffic. Thus, SBC's language is not consistent with the FCC ISP Remand Order.

In addition, Level 3 notes that Footnote 82 of the ISP Remand Order specifically states that the call need not terminate in the local calling area in order to be deemed an ISP-Bound call. In response to certain interveners suggestion that the "information access" definition impugns a geographic limitation, the FCC held as follows:

> We reject that strained interpretation. Although it is true that "information access" is necessarily initiated "in an exchange area," the MFJ definition states that the service is provided "*in connection with* the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services"

CenturyTel of Michigan, Inc. d/b/a CenturyTel, Opinion and Order, Case No. U-11821 (Mich. PSC Apr. 12, 1999); Global NAPs, Inc. (U-6449-C) Petition for Arbitration of an Interconnection Agreement with Pacific Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996, A.01-11-045, A.01-12-026, Opinion Adopting Final Arbitrator's Report With Modification (Cal. PUC July 5, 2002); *Investigation as to Whether Certain Calls are Local*, DT 00-223, *Independent Telephone Companies and* Competitive Local Exchange Carriers – Local Calling Areas, DT 00-054, Final Order, Order No. 24,080 (NH PUC Oct. 28, 2002); Declaratory Ruling Concerning the Usage of Local Interconnection Services for the Provision of Virtual NXX Service, Docket 28906, Declaratory Order (Ala. PSC Apr. 29, 2004); Allegiance Telecom of Ohio, Inc.'s Petition for Arbitration of Interconnection Rates, Terms, and Conditions, and Related Arrangements with Ameritech Ohio, Case No. 01-724-TP-ARB, Arbitration Award (PUC Ohio Oct. 4, 2001) at 9. *See also*, Petition of Global NAPs, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with United Telephone Company of Ohio dba Sprint, Case Nos. 01-2811-TP-ARB, 01-3096-TP-ARB (PUC Ohio May 9, 2002) (same result); DPUC Investigation of the Payment of Mutual Compensation for Local Calls Carried Over Foreign Exchange Service Facilities, Dkt. No. 01-01-29 (Conn. DPUC Jan. 30, 2002) at 41-2; TDS Metrocom, Inc., Case No. U-12952, Opinion and Order (Mich. PSC Sept. 7, 2001); Essex Telecom, Inc. v. Gallatin River Communications, L.L.C., Docket No. 01-0427, Order (Ill. C.C. July 24, 2002) at 8; In the Matter of Level 3 Communications, LLC Petition for Arbitration Pursuant to 47 U.S.C. Section 252 of Interconnection Rates, Terms and Conditions With CenturyTel of Wisconsin, Docket 05-MA-130, Arbitration Award (WI PSC Dec. 2, 2002) at 20-21.

> *United States v. AT&T*, 552 F. Supp. at 229 (emphasis added). *Significantly, the definition does not further require that the transmission, once handed over to the information service provider, terminate within the same exchange area in which the information service provider first received the access traffic*.

Level 3's language is consistent with the orders and regulations applying to ISP-Bound Traffic. As such, the Commission should adopt Level 3's language in IC Appendix Section 3.3.

(2) SBC

Level 3 and SBC disagree as to the definition of the term "ISP-Bound Traffic" for purposes of intercarrier compensation. SBC proposes to limit "ISP-Bound Traffic" to what is effectively "local" ISP-bound traffic – that is, traffic from an originating end user customer to an ISP located in the same local exchange area (or mandatory local calling area) – while Level 3 opposes that limitation. SBC's proposed language properly implements the ISP Remand Order, while Level 3's does not, because local ISP-bound traffic is the only type of ISP-bound traffic addressed by the FCC in the ISP Remand Order. That is, the term "ISP-bound traffic" in the ISP Remand Order refers to calls from end users to ISPs physically located in the same local calling area, and not ISP traffic between end users and ISPs located in different local calling areas. Therefore, the parties' contract should thus make clear that the FCC's interim intercarrier compensation plan is applicable only to ISP Bound traffic from end users to ISPs physically located in the same local calling area.

(3) Staff

Here again the parties offer competing proposals to classify traffic for purposes of intercarrier compensation. Again, according to the Staff, the utility of these classifications will depend on how well the distinctions in traffic identified by these classifications match the distinctions in compensation levels appropriate for the respective traffic types. Staff Init. Br. at 16.

In this instance, the Staff finds that the fundamental dispute is whether ISP-bound traffic should be defined according to the geographic location of the calling and called parties rather than based upon the calling and called parties phone numbers – in essence whether VNXX or FX-like ISP-bound traffic should be classified separately from ISP-bound traffic. As observed above, the Commission has distinguished between ISP-bound and VNXX or FX-like ISP-bound traffic.[234] As a classification matter, separately classifying ISP-bound and VNXX or FX-like ISP-bound traffic does not prevent either the Commission or the FCC from proscribing intercarrier compensation rules for VNXX or FX-like ISP-bound traffic that match intercarrier compensation rules

[234] Id. at 120.

applicable to ISP-bound traffic. Adding this distinction does, however, permit either the Commission or FCC to prescribe separate and distinct rules for VNXX or FX-like ISP-bound traffic and ISP-bound traffic. Adding the distinction (along with a specific VNXX or FX-like passage as proposed by SBC with respect to Issue IC-11) also identifies -- explicitly rather than implicitly -- the appropriate intercarrier compensation rates applicable to VNXX or FX-like ISP-bound traffic. Staff Init. Br. at 16-17.

Alternatively, Level 3 offers a definition of ISP-bound traffic that would encompass such traffic as "local" ISP-bound traffic, "VNXX or FX-like" ISP-bound traffic, and interexchange traffic delivered through IXCs bound for an ISP. The Staff finds this classification to be overly broad. For example, it does not reflect differences in traffic that result from differences in intercarrier compensation rates that the Commission has deemed applicable to the respective traffic in past decisions. Staff Init. Br. at 17.

Thus, Staff recommends the Commission accept SBC's proposed language for Appendix Intercarrier Compensation Section 3.3.

b) Analysis and Conclusions

This issue is substantively identical to Issue DEF-8. Accordingly, the Commission's resolution of that issue also resolves Issue IC-5.

6. IC-6 (Level 3)(a) Should the parties compensate each other for circuit switched traffic according to the FCC's orders defining such traffic?

(Level 3)(b) Should the agreement refer to SBC's improper definition of "Section 251(B)(5) traffic?

(SBC)(a) Should the Party whose End User originates Section 251(b)(5) Traffic compensate the Party who terminates such traffic to its End User for the transport and termination of such traffic?

(SBC)(b) Not an Illinois issue.

(SBC)(c) Should the Agreement define the term ULEC?

a) Parties' Positions and Proposals

(1) Level 3

In its April 2001 ISP Remand Order, the FCC asserted exclusive jurisdiction over compensation issues related to ISP-bound traffic.[235] In the ISP Remand Order, the FCC

[235] ISP Remand Order, at ¶ 46. Although the U. S. Court of Appeals for the D.C. Circuit remanded the ISP Remand Order to the FCC for further consideration, the Court did not vacate the Order, leaving the

ruled that traffic to ISPs was excluded from the reciprocal compensation requirements of Section 251(b)(5) by operation of Section 251(g) of the Act. This aspect of the ISP Remand Order was rejected though not vacated by the D.C. Circuit.

SBC attempts to burden the Agreement with the imposition of an undefined term, "Section 251(b)(5) Traffic". In fact, in Level 3's review of the various FCC regulations and orders related to ISP-Bound Traffic, Level 3 is unaware of and unable to locate any definition of traffic that is associated with the phrase "Section 251(b)(5) Traffic". It appears to Level 3 that SBC's crafting of this new term is SBC's attempt to impose bill and keep arrangements for the exchange of FX or VNXX traffic, and access charges for IP-Enabled traffic.

Level 3 opposes SBC's attempt to impose its own self-serving definition into the agreement, as the use of such undefined term can only lead to confusion and potential disputes in the future as to whether certain types of traffic fall under the scope of SBC's undefined term (and whether access charges are applicable to this unknown traffic). Rather, Level 3 proposes the more accurate term ""Circuit Switched Traffic" with respect to intercarrier compensation. As explained in IC Issue 1, the use of the term Circuit Switched Traffic corresponds with the FCC Orders related to this issue, as the FCC has addressed the appropriate compensation regimes for this type of traffic. As such, the Commission should reject SBC's attempts to impose access charges on any traffic that may fall under SBC's undefined "Section 251(b)(5) Traffic" definition, and accept Level 3's term "Circuit Switched Traffic" in IC Appendix Sections 1.6 and 3.6.

(2) SBC

IC Issue 6 concerns SBC's proposal to use the term "Section 251(b)(5) Traffic," and Level 3's competing proposal to use the term "Circuit Switched Traffic." For the reasons set forth under IC Issue 3, SBC's proposed language should be adopted, and Level 3's rejected.

(3) Staff

The Staff notes that it is not clear that this is an Illinois issue. Both parties include language that appears responsive to a dispute between Level 3 and SBC in Connecticut. The only disputed language that does not appear Connecticut-specific is contained in the first sentence of Appendix Intercarrier Compensation Section 3.6. With respect to this passage, the parties agree to language that would require the party that originates traffic for an end user to pay the party that terminates the traffic for an end user for transport and termination. The parties disagree on whether this provision should apply to Section 251(b)(5) traffic and ISP-bound traffic as proposed by SBC or to circuit switched traffic as proposed by Level 3. Staff Init. Br. at 17-18.

---

federal compensation regime in place while the FCC deliberates the issue once again. Accordingly, even though the legal reasoning providing the authority for the FCC to promulgate its federal compensation regime has been rejected, the federal compensation regime itself remains intact and applies in this case.

As with many previous issues, in the Staff's view, resolution of this issue depends on which classification of traffic better reflects differences in intercarrrier compensation treatment for such traffic. In this regard, Level 3's proposal is overly restrictive. For example, the party that originates traffic for an end user must pay the party that terminates the traffic for an end user for transport and termination charges even if the traffic is originated and terminated as a PSTN call, but contains IP routing in the middle.[236] The parties appear to be in agreement on this point. However, Level 3's proposed language, which restricts focus of these provisions to circuit switched traffic, would render such agreed upon provisions inapplicable to IP in the middle circumstances. Staff Init. Br. at 18.

Alternatively, the Staff finds SBC's proposal as potentially overbroad in that it could be read to include IP-PSTN traffic as subject to the requirements of Appendix Intercarrier Compensation, Section 3.6. However, if the Commission accepts Staff's recommendation with respect to Issue IC-1, then IP-PSTN VoIP traffic will be classified separate and apart from 251(b)(5) and ISP-bound traffic. Staff, therefore, recommends that the Commission, conditional on its acceptance of Staff's recommendation for Issue IC-1, accept SBC's proposed language for Appendix Intercarrier Compensation, Section 3.6. Staff Init. Br. at 18-19.

b) Analysis and Conclusions

Level 3 IC-6(a & b). As we determined in our resolution of Issues DEF-18 and IC-3, SBC's proposed use of the term "Section 251(b)(5) Traffic" is disapproved, for the reasons articulated in connection with those issues. Either "Telephone Exchange Service Traffic" or "Local Traffic" should be used instead. Similarly, "Circuit Switched Traffic" is also rejected, for the reasons stated in our resolution of Level 3 Issue IC-2(k).

SBC IC-6(a). As we determined in our resolution of Issues DEF-18 and IC-3, SBC's proposed use of the term "Section 251(b)(5) Traffic" is disapproved, for the reasons articulated in connection with those issues.

SBC IC-6(c). SBC objects to inclusion of Level 3's proposed term "ULEC" in the parties' ICA. Level 3 offers no apparent defense of that term and the Commission perceives no reason to approve it on our own volition.

7. IC-7 (Level 3)(a) Should the Parties impose intercarrier compensation charges on traffic that is used to test connections or equipment connected to each other's network?

(Level 3)(b) Should SBC be in the position to enforce compliance with state rules relating to 911 service, by withholding compensation?

---

[236] See, *Order*, In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges FCC No. 04-97, WC Docket No. 03-361(rel. April 21, 2004).

(SBC)(a) When should the Parties' obligation to pay Intercarrier Compensation to each other commence?

(SBC)(b) When should the Parties' obligation to pay access charges commerce?

a) Parties' Positions and Proposals

(1) Level 3

As detailed above, the purpose of intercarrier compensation is to make a carrier whole when traffic originates from and terminates to customers subscribing to each other's services. In an attempt to squeeze every possible nickel of access charges out of Level 3, SBC's language forces Level 3 to pay access charges on all test traffic on, for instance, 911 trunks when Level 3 is attempting to make sure that its 911 facilities are properly connected to SBC's network.

The issue in IC Issue 7(a) is whether compensation is due for traffic that consists solely of testing connection or equipment connected to the network – i.e., traffic that is not originated from or terminated to a customer. Test calls are not originated from or terminated to either SBC's or Level 3s customers. As such, these calls do not result in the completion of traffic between customers, and should not be included in the intercarrier compensation regime governed by this agreement. In light of this, the Commission should reject SBC's language in IC Appendix Section 3.7, and adopt Level 3's more rationale approach to exempting test calls from the access charge regime.

SBC's language in IC Appendix Section 3.7 provides that the obligation to provide compensation commences "on the date *the Parties agree* that the interconnection is complete…" From Level 3's perspective, SBC should have no role in determining when, or if, Level 3's interconnection is complete. In practical effect, under SBC's language, SBC has a role in determining when, or if, Level 3's 911 trunks are interconnected. If SBC deems them not in compliance with the Commission's 911 rules, then it can refuse to compensate Level 3 for the traffic. SBC should have no say in determining whether Level 3 is in compliance with the Commission's rules. SBC is not a regulatory agency like the Commission, nor does SBC have any authority to enforce the Commission's rules. SBC should not be put in a position where it can unilaterally make the determination as to when Level 3 is or is not in compliance with a state regulation, and thus withhold any compensation due Level 3 based on its own self-interested determinations. As such, the Commission should reject SBC's language in IC Appendix Section 3.7, and accept Level 3's more rational approach to prohibiting SBC from withholding compensation when it unilaterally determines Level 3 may not be properly interconnected.

(2) SBC

SBC proposes that the parties begin paying each other compensation for intercarrier traffic on the date that the parties agree interconnection is complete and

ready to handle traffic of all pertinent types, including Section 251(b)(5) and ISP bound traffic, 911 traffic and traffic routed over High Volume Call-In ("Choke") trunks for purposes of taking large volumes of calls for high-volume bursts of traffic such as radio station contests. With regard to 911 provisioning, the network is considered complete only after Level 3 furnishes confirmation that it has 911 agreements in place with Public Safety Answering Points (or after Level 3 secures a 911 waiver from SBC). Absent a waiver, SBC does not turn the interconnection trunks up for service until 911 confirmation is provided. Once confirmation is received, SBC considers that the network is complete and a CLEC is capable of originating and terminating traffic for end users, not simply test traffic.

Level 3 asserts that intercarrier compensation should not be due for test traffic, but SBC's proposed language already takes that concern into account. Even though intercarrier compensation arrangements may not apply on all different traffic types, such as Information Services traffic, the network must be considered "complete" by both parties prior to exchanging and compensating for "live" traffic. Before passing this live traffic, carriers often send test calls over various portions of the network to ensure that the network is routing and completing calls in an appropriate manner. SBC's contract language does not require test traffic – no matter the volume of it – to be compensated under intercarrier compensation provisions in the contract, but instead requires compensation only after *both* parties agree that interconnection is complete.

As with other provisions governing the treatment of access traffic, the parties' respective tariffs govern the terms and conditions for the commencement of intercarrier compensation for this type of traffic. Thus, Level 3's proposal to override those tariffs with contract language addressing the application of access charges to test traffic should be rejected.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

Level 3 IC-7(a). SBC avers that its proposed language for Section IC 3.7 will not require compensation for test traffic, because the carriers must mutually agree that interconnection is complete. SBC Init. Br. at 99-100. However, SBC's position on this sub-issue, as articulated in the Joint Revised DPL, asserts that billing will commence "*when SBC* considers that the network is complete." (Emphasis added.) That position is reinforced by the parenthetical in SBC's proposed text, which seems to define mutual agreement as the establishment of trunks, not as a meeting of the minds.

The Commission does not favor – and SBC does not appear to recommend – a compensation requirement for test traffic. Network reliability and safety are primary concerns, and their realization should not be discouraged by the imposition of charges for genuine testing activities. Therefore, because of the ambiguity of SBC's position in its recommended language, we approve Level 3's proposed text for Section IC 3.7.

However, the first clause of Level 3's text (that is, from "arises" through "party") must be deleted, because it could be construed to eliminate compensation for traffic when a third carrier is involved or when a non-subscriber uses the services of the parties here. The subsequent, complete sentence in Level 3's text (beginning with "Accordingly") is specific to test traffic and will suffice for the purpose we approve.

Level 3 IC-7(b) and SBC IC-7(a) & (b). While our resolution of Level 3 IC-7(a) addresses test traffic, it does not determine when intercarrier compensation should begin. In the latter context, Level 3 is concerned that SBC will arbitrarily withhold agreement in order to delay intercarrier compensation. That concern would presumably not have arisen if SBC had proposed language consistent with the position it took in the Joint Revised DPL. There, SBC linked the commencement of intercarrier compensation to certain 9-1-1 arrangements - that is, to objective events that would preclude bad faith. However, SBC's proposed language for Section 3.7 contains other elements about which the parties disagree (originating trunks and mass calling trunks), thereby inviting subsequent disputes that could delay intercarrier compensation.

Consequently, the Commission concludes that Section 3.7 should provide that intercarrier compensation will commence once SBC receives 9-1-1 confirmation. The Level 3 provision that we approved in connection with Level 3 sub-issue IC-7(a) would then establish an exception for test traffic.

8. IC-8 (Level 3) Should the parties be required to deliver Call Record on all traffic regardless nature of the traffic, and the cost and technical feasibility of developing such technical systems.

(SBC) Should the duty to provide CPN with the call flow be imposed on all traffic the parties exchange, or just the Circuit Switched Traffic the parties exchange?

a) Parties' Positions and Proposals

(1) Level 3

These issues are linked to certain of the Call Record Issues detailed in below, and should be made consistent with the Commission's findings thereto. With respect to Issue 8, Level 3 notes that even SBC admits in its own Petition for a Declaratory Ruling Regarding IP Platform Services that "it would be impracticable, as well as inimical to the technological premise of the Internet, to separate out any discrete, 'intrastate' components of that data stream."[237] If it is impractical to separate out discrete 'intrastate' components of the IP data stream, then why should Level 3 be forced to undertake the crushing time and expense associated with developing these

[237] SBC Petition at 37-38.

impracticable systems? SBC's proposal is an attempt to add to Level 3's costs of building out its services, and increasing its costs.

In all of these issues, Level 3 is asking that the Agreement not restrict the parties' ability to negotiate and implement different formats for billing based upon new technologies. Level 3 is not seeking to impose a particular different format, just that the agreement preserve the ability to mutually agree on a different system other than the one SBC desires to be specifically named in the disputed language. In light of these arguments, and the arguments found in the Call Recording issues below, Level 3 encourages the Commission to adopt its language in Intercarrier Compensation Appendix Sections 4.1-4.5, 11.1, 12.1-12.3, 12.5-12.6, and 12.9.

(2) SBC

Calling Party Number ("CPN") information allows a carrier that receives traffic from another carrier to determine whether or not the traffic is Section 251(b)(5) traffic, and therefore whether it is subject to reciprocal compensation or to appropriate access charges or a bill and keep arrangement. SBC proposes that Section 4.5 require the parties to transmit CPN on all "traffic" the parties exchange. If any type of traffic is allowed to pass without CPN, improper arbitrage opportunities would result, because traffic could be mis jurisdictionalized; in other words, access traffic could be passed off as section 251(b)(5) traffic. Because standard telephone industry practice requires carriers to pass along CPN with calls, including such a requirement in the parties' agreement is reasonable in order to ensure contractual certainty and conformance with standard practice.

Level 3's proposed language for Section 4.5 would require that CPN be provided only for "Circuit Switched Traffic." That language is inappropriate, and should be rejected. As explained above under IC Issue 3, Level 3's proposed term "Circuit Switched Traffic" is both inappropriate and unduly restrictive. For instance, "Circuit Switched Traffic" excludes wireless traffic that is terminated on the PSTN, and thus Level 3's proposed language could inappropriately allow carriers to strip wireless calls of CPN. Without SBC's proposed language, a CLEC might improperly use the parties' local interconnection trunks to exchange traffic that is not within the scope of this Agreement, and might disguise that fact by not including the CPN. The essential purpose of the SBC language to which Level 3 objects (all "traffic") is that if Level 3 does (improperly) pass such traffic to SBC over the parties' local interconnection trunks, Level 3 has a contractual obligation to include the CPN so that SBC can see what is happening on its network.

Level 3 also argues that CPN is not available in all circumstances, such as for "IP Enabled Traffic," and thus the obligation to provide CPN should be limited to "Circuit Switched Traffic." That excuse does not hold water. Even calls originated in the IP format have an underlying telephone number associated with the end user that originated the IP call, and SBC simply seeks to obtain that underlying telephone number in order to appropriately rate and bill for that call.

Level 3 also proposes to replace the term "CPN" with the term "Call Records." L3 §§ 4.1 – 4.5. That proposal too should be rejected. CPN is the standard call identification, known and used throughout the industry for the billing of intercarrier traffic. Moreover, the term is expressly defined by FCC regulation. 47 C.F.R. § 64.1600(c). "Call Records," on the other hand, is a term made up by Level 3.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

In view of our resolution of Issue DEF-8 above, which excludes Level 3's proposed definition of "Call Record" from the ICA, and our resolution of Level 3 Issue IC-2(a), above, in which we refrain from making any substantive decisions regarding IP-enabled services, no ruling on this issue is required.

9. IC-9 (Joint Issue (a)) Should the dispute resolution process for ISP-Bound Traffic be the same as dispute resolution process for Section "251 (B)(5) traffic?

(Level 3)(b) Should SBC be able to block the other's traffic without following the dispute resolution procedures in the event of a dispute over the jurisdictional nature or classification of traffic?

(SBC)(b) Should the ICA specify that disputes related to the jurisdictional nature of traffic be subject to the dispute resolution process contained in this agreement?

a) Parties' Positions and Proposals

(1) Level 3

This issue is closely related to the disputed language found in PC Issue 3 below, and should be decided consistent with the Commission's deliberations therein. Level 3 proposes that the Agreement contain the same dispute resolution procedures for ISP-Bound Traffic as with any other sort of traffic. This is a common-sense approach to avoid confusion and litigation in the future as to what form of dispute resolution procedures govern a particular dispute. The parties will be forced to dispute not only the billing error, but also the type of traffic that is the subject of the billing error. Further, there is no legal basis for creating a new dispute resolution process aimed at ISP-Bound traffic. In order to avoid creating disparate processes resulting in confusion in the future, the Commission should adopt Level 3's suggested language in Intercarrier Compensation Appendix Sections 4.7.2.1, and reject SBC's language in Section 5.6.

(2) SBC

The parties appear to agree that the same dispute resolution process should apply to both ISP-bound traffic and traffic subject to section 251(b)(5). Thus, SBC asserts, the Commission should approve SBC's proposed Section 5.6, which provides: "The parties agree that all terms and conditions regarding disputed minutes of use, nonpayment, partial payment, late payment, interest on outstanding balance, or other billing and payment terms shall apply to ISP-Bound Traffic the same as for Section 251(b)(5) Traffic under this Appendix."

The Commission should reject Level 3's proposed counter-language, because it is overly broad. Level 3 proposes that "[s]hould any dispute arise over the jurisdictional nature or classification of traffic," the parties will use "the dispute resolution process contained within this Agreement." L3 § 4.7.2.1. While Level 3's language would have the effect of subjecting ISP-bound traffic and section 251(b)(5) traffic to the same dispute resolution process, it would also, and inappropriately, subject disputes regarding *all other "traffic"* to the agreement's dispute resolution process. That would be inappropriate, because disputes regarding traffic outside the scope of the parties' agreement should not be subject to the agreement's dispute resolution provisions. Rather, any such disputes should by governed by the tariffs applicable to such traffic.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

The parties' arguments are not entirely congruent with the sub-issues framed, but they do address a dispute that appears readily resolvable. SBC is concerned that traffic outside the scope of the parties' ICA could be inappropriately subject to ICA dispute resolution. SBC Init. Br. at 102. That concern can be alleviated by language limiting ICA dispute resolution to, for example, "traffic subject to this agreement." Level 3 is apprehensive about "confusion" resulting from different dispute resolution mechanisms. Level 3 Init. Br. at 122. By adding the language we suggest in the preceding sentence (or other language conveying that intention), a single dispute resolution mechanism - which both parties apparently prefer - becomes the superior alternative and should be adopted.

10. IC-10 (Level 3)(a) Does SBC properly define the term "Section 251(b)(5)" traffic such that it should be included in a heading of the agreement?

(Level 3)(b) Assuming that the parties have agreed to a compensation scheme for ISP-Bound traffic, do those terms apply to what SBC defines as "Section 251(b)(5) Traffic"?

(Level 3)(c) Should the Parties' exchange compensation for ISP-bound Traffic at the rates agreed to in the parties existing agreement pending the FCC's ISP Remand Order?

(SBC)(a) Should the Reciprocal Compensation terms of the Agreement apply to "Telecommunications Traffic," or to "Section 251(b)(5) Traffic"?

(SBC)(b) What intercarrier compensation arrangements should apply until SBC offers to exchange traffic pursuant to the compensation arrangement set forth in the FCC's ISP Remand Order?

(SBC)(c) Should the Commission adopt SBC's Bifurcated Rate Structure for the exchange of what SBC defines as "Section 251(b)(5) traffic?

(SBC)(d) Should SBC"s proposed language regarding Tandem Serving Rate Elements and End Office Serving Rate Elements be incorporated into this Appendix?

(SBC)(e) Is Level 3 entitled to charge the tandem reciprocal compensation rate?

a) Parties' Positions and Proposals

(1) Level 3

For the reasons stated in response to IC Issue 6 a and b above, the Commission should reject any attempt by SBC to impose access charges on whatever traffic SBC determines would fall under the penumbra of its undefined "Section 251(b)(5) Traffic" term.

As such, the Commission should adopt Level 3's language in IC Appendix Section 5.0, 5.2, 5.2.1, 5.2.1.1, 5.2.2, 5.2.2.1, and 5.2.2.2.

The Parties current Agreement requires the Parties to compensate each other for termination of ISP-Bound traffic at $0.0005. However, in light of the ISP Remand Order, the parties shall exchange traffic at the rate of $0.0007 per minute of use. The FCC is expected to release its newest ISP Remand Order adopting permanent rules on intercarrier compensation for ISP-Bound Traffic soon. In the meantime, the parties shall conform their agreement to reflect a rate of $0.0007 per minute of use, as elected by SBC.

(2) SBC

IC Issue 10 concerns Section 5 of the Appendix IC, which addresses reciprocal compensation under Section 251(b)(5) of the 1996 Act. The parties have a number of discrete disputes regarding Section 5.

SBC's proposed language provides that reciprocal compensation applies to the termination of "Section 251(b)(5) Traffic," while Level 3 proposes to apply reciprocal compensation to "all circuit switched Local Traffic" and "ISP-Bound Traffic." L3 § 5.2. SBC explains under IC Issue 3 (which discussion is fully incorporated herein by reference) that the Commission should reject Level 3's proposal, and adopt SBC's. In the ISP Remand Order (¶¶8, 45, 46), the FCC expressly rejected use of the terminology "local traffic" for reciprocal compensation purposes, in favor of the terminology "section 251(b)(5) traffic."

Level 3's proposed language is also inconsistent with federal law insofar as Level 3 proposes that ISP-bound traffic is subject to reciprocal compensation (L3 § 5.2), and insofar as Level 3 refuses to implement the interim compensation scheme for ISP-bound traffic created by the ISP Remand Order. The core holding of the FCC's ISP Remand Order is that ISP-bound traffic is not subject to the reciprocal compensation obligation of Section 251(b)(5) of the 1996 Act: "ISP-bound traffic is not subject to the reciprocal compensation requirement in section 251(b) because of the carve-out provision in section 251(g), which excludes several enumerated categories of traffic from the universe of 'telecommunications' referred to in section 251(b)(5)." ISP Remand Order, ¶ 23. *See also id.* ¶¶ 3, 54. Instead, the FCC held, ISP bound traffic is subject to the FCC's ISP Remand Order compensation plan, which consists of a series of declining rate caps that ILECs may elect. Id. 7-8. SBC has elected to use those rate caps and thus, pursuant to federal law, the current compensation rate for ISP-bound traffic is $0.0007 per minute. ISP Remand Order, ¶¶ 7-8.

Level 3, however, proposes to ignore the ISP Remand Order's ISP-bound traffic rate caps, and its holding that ISP-bound traffic is not subject to reciprocal compensation. Instead, Level 3 proposes to treat ISP-bound traffic like "local" traffic, subject to a reciprocal compensation rate of $0.0005 per minute. L3 § 5.2.3. Level 3 does not even attempt to offer a legal justification for its scofflaw proposal, but instead merely asserts that the FCC is likely to promulgate a new compensation regime prior to December 31, 2004, and in the meantime the Commission should "hold the status quo." Level 3 Position Statement, IC Issue 10. That is nonsense. If the FCC promulgates new rules governing compensation of ISP-bound traffic, SBC and Level 3 have *already agreed* to immediately implement those new requirements. Appendix IC, Joint § 5.1 ("At such time as the FCC issues a successor order to the current interim termination compensation plan, the parties agree to compensate each other according to such

Order immediately upon the effective date of the FCC order."). In the meantime, however, the Commission is bound to apply the ISP Remand Order.[238]

IC Issues 10(c)-(e) concern Sections 5.2 through 5.5 of SBC's proposed contract language, which provide for a bifurcated reciprocal compensation rate structure, list the end office and tandem rate elements that apply, and state that Level 3 is entitled to the end office serving rate elements only. Appendix IC, SBC §§ 5.2-5.5. SBC has exercised its right to invoke the ISP Remand Order's compensation plan for ISP-bound traffic. Thus, that FCC-created plan applies to ISP-bound traffic (as reflected in Section 6 of SBC's proposed Appendix IC language), and Sections 5.2-5.5 are inapplicable to ISP-bound traffic (as provided in Section 5.1 of SBC's proposed language, which makes Sections 5.2-5.6 inapplicable to ISP-bound traffic once SBC has elected the "terms and conditions of the FCC's interim ISP terminating compensation plan").

Moreover, because SBC has elected to use the ISP Remand Order's compensation terms for ISP-bound traffic, Level 3 has the option to require the parties to "exchange section 251(b)(5) traffic at that same rate" that applies to ISP-bound traffic. ISP Remand Order, ¶ 89. While SBC has proposed language that presumes Level 3 has elected to take advantage of this "mirroring" rule,[239] it is not clear whether Level 3 in fact wishes to invoke the mirroring rule. SBC's proposed Sections 5.2-5.5 come into play only if Level 3 *rejects* SBC's offer to exchange section 251(b)(5) traffic at the same rates, terms and conditions that apply to ISP-bound traffic under the provisions of the ISP Remand Order ($0.0007 per minute).

If Level 3 does not choose to mirror the rates for ISP-bound traffic, then a bifurcated rate structure should apply to section 251(b)(5) traffic, as provided in SBC's proposed Section 5.2. Reciprocal compensation rates recover (among other costs) the costs of two functions that are performed by an end office switch: (i) setting up the call, and (ii) keeping the switch port open during the call. The costs for both functions are known (and are not directly at issue here). These costs could be recovered by a "unitary" rate or by a "bifurcated" rate. A "unitary" rate is a simple per-minute rate, calculated by spreading the cost of setting up the call (which is incurred one time per call, regardless of the duration of the call) across the duration of *an average call.*

If a unitary rate is used, the charge for some individual calls is "too high," while the charge on other individual calls is "too low." Specifically, the charge for calls shorter than five minutes in duration would be too low, while the charge for calls longer than five minutes in duration would be too high.

Adoption of the bifurcated approach should be uncontroversial, because it indisputably yields more precise costs, and therefore fairer and more accurate rates,

---

[238] See also SBC's discussion of IC Issue 13(a) (explaining that the ISP Remand Order remains the law today).

[239] *See* SBC § 6.1 ("the following rates, terms and conditions set forth in Sections 6.2 through 6.6 shall apply to the termination of all Section 251(b)(5) Traffic and all ISP-Bound Traffic").

than the unitary approach. Thus, in the event that Level 3 does not opt to use the ISP-bound traffic rate ($0.0007 per minute) for section 251(b)(5) traffic, the Commission should adopt SBC's proposed bifurcated reciprocal compensation rate for such traffic.

In the event that Level 3 rejects SBC's offer, then Sections 5.2-5.5 set forth the appropriate rate structure for reciprocal compensation for section 251(b)(5) traffic, because in such an event the standard reciprocal compensation provisions should apply. Sections 5.3 and 5.4, for instance, set forth the four standard reciprocal compensation rate elements: three tandem serving rate elements (tandem switching, tandem transport, and end office switching in a tandem serving arrangement) and one end office serving rate element (end office switching). If Level 3 does not opt to take advantage of the ISP Remand Order's mirroring rule, then these industry-standard reciprocal compensation rate elements should apply.

Finally, if Level 3 chooses not to take advantage of the mirroring rule, then the parties' contract should provide that Level 3 is entitled to the end office serving rate element only, and not the tandem serving rate elements. SBC § 5.5. This issue is governed by 47 C.F.R. § 51.711(a)(3), which provides:

> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

Thus, the Commission's decision on this issue depends on whether or not Level 3 has proven that its switch serves a geographic area comparable to the area served by an SBC tandem switch. Level 3 has not even attempted to offer such proof. Thus, Level 3 is entitled only to the end office service rate element.

Transit Traffic (L3 § 5.2.2). Level 3 proposes to include language in the parties' Appendix IC addressing intercarrier compensation for "Transit Traffic." SBC discusses this issue fully under ITR Issues 5 through 9 (which discussion is fully incorporated by reference herein), where SBC explains that transiting is not required by the Act and is thus not subject to arbitration under Section 252 of the Act. Thus, Level 3's proposals concerning transiting should not be included in the parties' interconnection agreement.

(3) Staff

All of the sub-issues raised by the parties with respect to this issue center around the appropriate intercarrier compensation rates for Section 251(b)(5) and ISP-bound traffic. As a threshold matter, the Staff finds that Level 3 appears to question whether intercarrier compensation determinations should be made based upon past agreements between the parties or whether they should be made based upon current FCC intercarrier compensation rules. Staff Init. Br. at 19.

First, Staff notes that Level 3 intimates that it wants the Commission to defer this decision, and indeed, to preempt itself. Level 3 witness William P. Hunt III gives it as his opinion that the entire matter is one that both SBC and Level 3 agree to be beyond Commission jurisdiction. *See* Level 3 Ex. 1.0 (Hunt) at 66 (Both carriers allegedly agree that IP-enabled services are interstate in character). However, Mr. Hunt further contends the Commission should "avoid any major changes to the current compensation regime for ISP bound traffic[.]" Level 3 Ex. 1.0 (Hunt) at 30. This barrier notwithstanding, Level 3 urges the Commission to adopt "the current compensation regime for ISP bound traffic that is in place between Level 3 and SBC", Id. Level 3 does not go so far as to suggest what the current scheme actually is, or upon what, if any, FCC rules or orders it is based. Level 3 intimates that the existing rate structure is .0005¢ per minute of use "for the exchange of all traffic[.]"[240] Id. at 62. This appears to be a reciprocal compensation rate, Id.; Level 3's proposed contract language indicates that the rate should be "$0.0005 per minute of use or at the state approved local compensation rates to terminate IP-enabled services traffic to either Party's end user customer." Joint Disputed Points List, Appendix Intercarrier Compensation Section 3.2.3.1. Staff Init. Br. at 19-20.

The Commission should, according to the Staff, where the FCC has existing and explicitly defined rules governing the compensation of exchanged traffic, make its determinations based on existing intercarrier compensation rules. Staff Init. Br. at 20.

Staff notes that unlike the IP-PSTN VoIP traffic issues addressed above, the FCC has current and effective rules explicitly addressing intercarrier compensation for both Section 251(b)(5) and ISP-bound traffic. These rules are found, among other places, in the Commission's ISP-Bound Traffic Order. *See, generally, Order on Remand and Report and Order*, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 / Intercarrier Compensation for ISP-Bound Traffic, FCC No. 01-131, CC Docket No. 96-98; 99-68 (April 27, 2001)(hereafter "ISP-Bound Traffic Order" or "ISP Remand Order"). Also, the parties currently exchange Section 251(b)(5) and ISP-bound traffic, which cannot be said for IP-PSTN VoIP traffic. Tr. at 169, 240, and 256. Finally, unlike the IP-PSTN VoIP traffic issues above, the FCC has no statutory deadline for implementing any revisions to its existing rules that might arise from its general intercarrier compensation docket.[241] Thus, unlike the IP-PSTN VoIP issues addressed above the Commission can look to explicit FCC rules for

[240] Notwithstanding this, Mr. Hunt states that Level 3 will, when acting as an interexchange carrier, "pay access charges for traditional circuit-switched phone-to-phone InterLATA traffic." Level 3 Ex. 1.0 (Hunt) at 45. This rate, approximately $0.0123, is obvious far higher than Level 3's proposal. Staff Ex. 1.0 (Zolnierek) at 11.

[241] Notably, Level 3's expressed expectation that the FCC would replace its existing rules by October 2004 through a new ISP-Bound Traffic Order have not been realized. See DPL – Intercarrier Compensation, Issue No. IC-13. The FCC has, however, acted upon the Core Forbearance Petition. Staff's recommendation are based upon the FCC's existing rules and regulations including those included in the FCC's Order in the Core Forbearance proceeding.

resolution of intercarrier compensation issues regarding Section 251(b)(5) and ISP-bound traffic. Staff Init. Br. at 20-21.

Level 3 objects to SBC's Proposal to use the term "Section 251(b)(5) Traffic" in Appendix Intercarrier Compensation, Section 5, arguing that this term is something SBC created out of whole cloth. Level 3 – SBC 13State – DPL – Intercarrier Compensation, Issue No. IC – 10. It is not, according to Staff. The FCC uses this term repeatedly in ISP-Bound Traffic Order. *See* ISP-Bound Traffic Order, ¶¶ 8, 25, 89, 98. Indeed, in the ISP-Bound Traffic Order, the FCC abandoned its official definition of "local traffic", citing unnecessary ambiguities created by the term "local traffic", and characterized traffic that is subject to reciprocal compensation under Section 251(b)(5) as "251(b)(5) traffic". ISP-Bound Traffic Order, ¶¶34-41. Thus, in Staff's view, the jurisdictional definition "251(b)(5) traffic" is certainly not a new creation – it finds its origin in the ISP-Bound Traffic Order, which establishes the rules governing intercarrier compensation rates for such traffic. In addition, as explained above, traffic subject to Section 251(b)(5) has, for purposes of intercarrier compensation, been treated differently from other types of traffic, including ISP-bound traffic. Thus, Staff recommends the Commission accept SBC's proposal to reference the term "Section 251(b)(5) Traffic" in Appendix Intercarrier Compensation, Section 5. Staff Init. Br. at 21.

Level 3 recommends the parties continue forward with their existing contract rates for Section 251(b)(5) traffic and ISP-bound traffic --- a rate of $0.0005 per minute of use. Level 3 Ex. 1.0 (Hunt) at 62. Level 3's position with respect to this issue is decidedly unclear. As explained above, Level 3 appears to the Staff to propose that the Commission ignore existing intercarrier compensation rules and instead simply carry forward existing intercarrier compensation rates contained in the parties' existing contract. Even if Staff misapprehends Level 3's position, and Level 3 is not recommending that the Commission ignore existing intercarrier compensation rules, Level 3 has not explained how its proposal complies with the ISP-Bound Traffic Order. Staff Init. Br. at 21-22.

The Staff finds that Level 3's failure to explain the interaction between its proposal and the ISP-Bound Traffic Order adds general uncertainty to resolution of this issue. For example, under the ISP-Bound Traffic Order, SBC is entitled to, and has in fact elected to, invoke FCC-defined rate caps for the exchange of ISP-bound traffic. ISP-Bound Traffic Order, ¶ 89 and ILL.C.C. No. 20, Part 23, Section 2, 5th Revised Sheet No. 3. n. 1. In making this election, SBC is required to offer to exchange Section 251(b)(5) traffic at the same rates that apply for the exchange of ISP-bound traffic. ISP-Bound Traffic Order, ¶ 89. Thus, with respect to the FCC's framework the ball is in Level 3's court. That is, the FCC rules require SBC and Level 3 to exchange Section 251(b)(5) traffic at the same rate as ISP-bound traffic *if* Level 3 elects to do so. However, Level 3 has not indicated in this proceeding, and presumably has not indicated to SBC, whether or not it wants to elect the ISP-bound rates for 251(b)(5) traffic. Like SBC, Staff is left to assume that Level 3 prefers the rates to be the same because the rates in the existing contract between to the two carriers are the same. Staff Init. Br. at 22.

The Staff assumes that Level 3 prefers to exchange both Section 251(b)(5) and ISP-bound traffic at the same rate, inasmuch as Mr. Hunt's testimony states with approval that the FCC is moving towards such a regime. Level 3 Ex. 1.0 (Hunt) at 30-31. In essence, the Staff is assuming that if the Commission rejects Level 3's proposal to establish a rate of $0.0005 for both Section 251(b)(5) and ISP-bound traffic, and instead orders the parties to exchange ISP-bound traffic at a rate of $0.0007, Level 3 would prefer to exchange Section 251(b)(5) traffic at a rate of $0.0007, rather than at the intercarrier compensation rates contained in SBC's existing Illinois tariffs, or at some other rates (such as the bifurcated rates contained in SBC's alternative proposals). In the event that Level 3 fails to confirm Staff's assumption, Staff recommends the Commission order the parties to adopt a uniform rates for Section 251(b)(5) and ISP-bound traffic. The FCC has expressed a clear policy of seeking to unify intercarrier compensation rates, *see Order*, ¶2, Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the *ISP Remand Order*, FCC No. 04-241; WC Docket No. 03-171 (rel. October 18, 2004) (hereafter "Core Forbearance Order") ("The Commission [is] particularly interested in identifying a unified approach to intercarrier compensation that would apply to all types of traffic and to interconnection arrangements between all types of carriers"), and Staff recommends the Commission follow that policy here to the extent it can within the boundaries of current federal and state law. Staff Init. Br. at 22-23.

The Staff points out that under a unified compensation regime, the disputes with respect to this issue can be greatly simplified. That is, all sub-issues concerning rate structure issues (i.e., SBC Issues 10c, 10d, and 10e) become moot. The primary issue here simplifies to whether the parties should exchange both Section 251(b)(5) and ISP-bound traffic at a rate of $0.0007 per minute of use, or whether the parties should exchange both Section 251(b)(5) and ISP-bound traffic at a rate of $0.0005. Staff Init. Br. at 23.

Staff recommends that the Commission accept Level 3's proposed rate of $0.0005. Staff Init. Br. at 23. First, $0.0005 is clearly below the rate cap of $0.0007 established by the FCC and is therefore consistent with the FCC rules. Second, the FCC states:

> Because the transitional rates are caps on intercarrier compensation, they have no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps or on a bill and keep basis (or otherwise have not required payment of compensation for this traffic). The rate caps are designed to provide a transition toward bill and keep, and no transition is necessary for carriers already exchanging traffic at rates below the caps. ISP-Bound Traffic Order, ¶8.

The rate of $0.0005 per minute of use, the Staff notes is the existing rate at which the Commission has authorized the parties to exchange such traffic and is a rate closer to bill and keep than $0.0007. Order in Docket No. 03-0392. Order in Docket

No. 03-0392. Therefore, according to Staff a rate of $0.0005 is not only consistent with the FCC rules and regulations, but also consistent with the policy directives outlined in the ISP-Bound Traffic Order. Staff Init. Br. at 24.

To implement Staff's recommendation, the Commission need only adopt SBC's proposed language for Appendix Intercarrier Compensation Section 5. In substance, this language serves only to point to SBC's proposed Intercarrier Compensation Section 6, which contains applicable intercarrier compensation rates in the event that SBC elects the FCC rate caps for ISP-bound traffic. However, since SBC has in fact elected the FCC rate caps, this regime would therefore be adopted as a mater of law. Staff notes that its recommendation here is contingent on adoption of its recommendations regarding modification of Section 6 explained below (within Issue IC - 13). Staff Init. Br. at 24.

b) Analysis and Conclusions

Level 3 IC-10(a) & (b) and SBC IC-10(a). As we determined in our resolution of Issues DEF-18 and IC-3, SBC's proposed use of the term "Section 251(b)(5) Traffic" is disapproved, for the reasons articulated in connection with those issues. "Telephone Exchange Service Traffic" of "Local Traffic" should be used instead. That ruling applies to all of the sub-issues presented in IC-10.

Level 3 IC-10(c). SBC is correct that this Commission must apply the law as it exists at the time than an arbitration decision is rendered. Insofar as SBC position correctly reflects the FCC's present ISP rules, it should be adopted. If the FCC alters applicable law thereafter, the parties should resort to the change-of-law provisions in their ICA to incorporate such changes, to the extent the FCC so requires.

SBC IC-10(b). The parties do not appear to have a disagreement about this sub-issue. SBC has elected to be subject to the rate caps prescribed in the ISP Remand Order, which sets the intercarrier compensation rate for ISP-bound traffic at $0.0007 per minute of use. Level 3 declares that "[i]n light of the ISP Remand Order, the parties shall exchange traffic at the rate of $0.0007 per minute of use." Level 3 Init. Br. at 115. Both sides thus propose the same outcome, based – accurately - on the same applicable law[242].

SBC IC-10(c). SBC maintains, first, that its proposed bifurcated rate structure "yields more precise costs." SBC Init. Br. at 108. Second, SBC contends that the benefit of simplicity from a unitary rate is outweighed by the risk of under- or over-compensation associated with using average call durations as an input. *Id*., at 107. SBC's first assertion is correct. The second contention involves a judgment call, which

[242] ISP Remand Order, ¶8. During post-hearing oral presentations, SBC changed its position and advocated a rate of $.0005. Tr._. SBC cited no legal basis for ignoring the clear directive in the ISP Remand Order. Indeed, SBC had previously characterized Level 3's initially recommended $.0005 rate as a "scofflaw proposal." SBC Init. Br. at 104.

the Commission is not willing to make on the present record for any purpose outside this arbitration. Nevertheless, since Level 3 has provided no countervailing argument, we will approve SBC's proposal in this instance.

We note that SBC's proposed subsections 5.2-5.5 apply only if the mirroring rule of the ISP Remand Order does not apply to the subject traffic.

SBC IC-10(d). SBC's proposal is satisfactory for the parties' ICA here. Level 3 articulates no particular objection. SBC's text is approved.

SBC IC-10(e). In its Intial Brief, at 109, SBC asserted that Level 3 had not attempted to prove that it served a geographic area comparable to SBC's (which would have entitled Level 3, under 47 CFR 51.711(a)(3), to SBC's tandem interconnection rate as part of the parties' reciprocal compensation). Level 3 did not reply, presumably because it expects the parties to be governed by the FCC's mirroring rule, rather than state reciprocal compensation rates. In any event, if and when state rates do apply, SBC's uncontested subsection 5.5 should be included.

11. IC-11 (Level 3)(a) Should Reciprocal Compensation apply to FX or FX-like services exchanged between the Parties based upon the NPA-NXX of the calling parties?

(Level 3)(b) Should the compensation for the exchange of OCA traffic under this agreement be limited to Circuit Switched OCA Traffic?

(SBC)(a) What is the appropriate form of intercarrier compensation for FX and FX-like traffic including ISP FX Traffic?

(SBC)(b) What is the appropriate form of Intercarrier compensation for Optional EAS Traffic?

(SBC)(c) Is it appropriate to include all IntraLATA toll traffic under an MPB arrangement?

(SBC)(d) What is the appropriate treatment and form of intercarrier compensation for intraLATA 8YY traffic?

(SBC)(e) Should non-section 251/252 services such as Transit Services be arbitrated in this section 251/252 proceeding?

(SBC)(f) Should SBC be required to use Level 3 as a transit provider to reach third parties that are already interconnected with SBC?

a) Parties' Positions and Proposals

(1) Level 3

As explained in the section related to IC Issue 5 above, the ISP Remand Order states that the call need not terminate in the local calling area in order to be deemed an ISP-Bound call. In Section 7.2 of the IC Appendix, SBC attempts to impose either access charges or bill and keep on FX or FX-like traffic based on SBC's belief that the determining factor in calculating intercarrier compensation is the physical local of the calling parties. As explained, that issue has never been a determining factor in rating a call. Rather, industry standards call for the rating of a call to be based upon the NPA-NXX of the calling parties. In light of the fact that SBC is attempting to impose a compensation regime that is not consistent with the industry standards and the ISP Remand Order holdings, the Commission must reject SBC's language in IC Appendix Section 7.2 and 14.1.

In IC Appendix Sections 8.1 and 8.2, SBC attempts to impose terms related too Optional Calling Areas ("OCAs") and Expanded 2-way calling scope ("EAS). Level 3's language clarifies that the compensation for the exchange of OCA traffic under the agreement is limited to Circuit Switched OCA Traffic and is consistent with FCC orders. As explained above, the FCC has held that IP-Enabled Traffic is not Circuit Switched Traffic, but rather is interstate information services, and not subject to access charges. As such, Level 3's language in Section 8.1 segregates the IP-Enabled Traffic Level 3 may have in the OCA from the Circuit Switched Traffic that Level 3 may have, for purposes of intercarrier compensation. As such, Level 3's language in Section 8.1 is consistent with the FCC mandates, and should be adopted.

As for Section 8.2 and 8.3, SBC proposes specific terms relating to the state of the law in Arkansas, Kansas and Texas regarding OCA and EAS. As these jurisdictions may alter or amend their current OCA plans, Level 3 argues that it is more appropriate to accept the state of the law (i.e., the Applicable Law) as it is rather than burden the Agreement with such minutia. As such, the Commission should adopt Level 3s language in IC Appendix Section 8.2, and reject SBC's language in both Sections 8.2, 8.3 and 14.1.

SBC claims that it can use its federal access tariffs to force Level 3 to segregate traffic exchanged between the Internet and the PSTN onto separate trunk groups. Specifically, SBC claims that Section 6 of its federal access tariff (FCC No. 1) requires that Level 3 purchase Feature Group D access trunks for the exchange of information services traffic between SBC and Level 3. However, SBC's tariff does not support such a strained reading. SBC acknowledges that IP-Enabled traffic is information services traffic. The FCC has already specified the interconnection regime that applies to such traffic in its ISP Remand Order. On the one hand, compensation for such traffic is the same as compensation for "local" traffic (either at the FCC's $0.0007/minute rate or at state-determined "Section 251(b)(5)" rates). ISP Remand Order at ¶¶ 89-94. On the other hand, physical interconnection arrangements for such traffic are exactly the same as apply to any other traffic being exchanged between an ILEC and a CLEC. ISP

Remand Order at ¶79 n.149; *see also* Petition of Core Communications, Inc., *Order,* WC Dkt. 03-171 (released October 18, 2004) at ¶5 n.16. Here, SBC seeks to impose special trunking (and compensation) obligations on IP-Enabled traffic. But as noted above, SBC acknowledges that IP-Enabled traffic (of the sort that Level 3 carries) is information services traffic — in this respect just like ISP-bound calls. There is, therefore, no basis for separate trunking — much less Feature Group D trunking — for this traffic.

SBC's claim that IP-Enabled traffic of the sort Level 3 carries should be handled on Feature Group D trunks boils down to the claim that such traffic is analogous to traditional interstate long distance traffic. In the ISP Remand Order the FCC stated that ISP service is analogous, though not identical, to long distance calling service." But the teaching of that order, if nothing else, is that while IP-Enabled traffic might seem like "plain old" long distance traffic in some respects, it is not — and has never been — treated like "plain old" long distance traffic, whether for purposes of interconnection, intercarrier compensation, or otherwise.[243] This distinctive treatment is evident in the ISP Remand Order, where, as noted above, compensation is subject to the FCC's special regime, while physical interconnection arrangements are the same as applicable to "normal" Section 251(b)(5) traffic. Nothing about IP-Enabled traffic of the sort carried by Level 3 suggests that any different result is appropriate.

Therefore, according to Level 3, not only is SBC's tariff-based argument unavailing; it actually shows that there could well be fatal defects in SBC's tariff. Other carriers have tried in the past to avoid the requirement to handle the exchange of information services traffic under normal Section 251/252 interconnection arrangements by interposing tariff terms. The courts have concluded that this amounts to an impermissible effort to "game" the system by pretermitting the negotiation/arbitration process mandated by Congress.[244] With respect to tariffs, Congress has enacted a detailed system for governing carrier rates for jurisdictionally interstate communications in Sections 201 through 208 of the Act. Substantively Section 201(b) requires rates terms and conditions to be "just and reasonable," while Section 202 bans unreasonable

---

[243] The separate and distinctive treatment of IP-Enabled traffic dates back to the very establishment of the access charge regime in late 1983. At that time the general term for such traffic was "Enhanced Service Provider" or "ESP" traffic. The FCC ruled that such traffic — despite being generally analogous to plain old long distance traffic — would be handled quite differently. *See* MTS and WATS Market Structure, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 711-15 (1983).

[244] *See, e.g.* Global Naps, Inc. v. FCC, 247 F.3d 252 (D.C. Cir. 2001); In The Matter Of Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., New York Telephone Company, And New England Telephone And Telegraph Company V. Global Naps, Inc., File No. E-99-22, FCC 99-381 Memorandum Opinion and Order (Rel. December 2, 1999); *See also,* FCC Virginia Arbitration Order, ¶ 592-600 (FCC Wireline Competition Bureau agrees that Verizon's attempt to be able to change prices contained in a negotiated interconnection agreement by virtue of filing a tariff for analogous services constituted an impermissible use of a tariff to circumvent the 251 and 252 process and therefore should be prohibited.).

discrimination. These substantive requirements are implemented via Sections 203 through 208. Section 203 requires that tariffs ("schedules") be filed for all "interstate and foreign wire and radio communications." 47 U.S.C. § 203; MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 512 U.S. 218, 229-231 (1994) ("MCI v. AT&T"); AT&T v. Central Office Telephone, 524 U.S. 214 (1998). Section 204 allows the FCC to suspend filed but not-yet-effective tariffs; places the burden of justifying them on the carrier; and permits retroactive refunds of initially-suspended charges found to be unreasonable. Southwestern Bell v. FCC, 168 F.3d 1344, 1350 (D.C. Cir. 1999). Section 205 allows the FCC to prescribe changes to existing tariffs, but only prospectively. Illinois Bell v. FCC, 966 F.2d 1478, 1481 (D.C. Cir 1992). Section 206 establishes carrier liability for damages due to their violations of the Act. MCI Telecom. Corp. v. FCC, 59 F.3d 1407, 1413 (D.C. Cir. 1995), *cert. denied,* 517 U.S. 1240 (1996). Section 208 directs the FCC to adjudicate such claims. *AT&T v. FCC,* 978 F.2d 727, 732 (D.C. Cir. 1992), *cert denied,* 509 U.S. 913 (1993).

Consistent with this detailed statutory design, the FCC has promulgated extensive rules applicable to federal tariffs, primarily in Part 61 of the FCC's rules. Primary among tariff requirements is clarity. "In order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations." 47 C.F.R. § 61.2. There is no question that SBC's tariff does not meet this basic standard in the context of IP-Enabled traffic. Nowhere does this tariff clearly and explicitly apply its rates and regulations to information services traffic of any sort. Moreover, by definition, it could not do so. In addition to trying to avoid its obligations under Section 251/252 with respect to Level 3, and in addition to ignoring the FCC's specific rules regarding interconnection and compensation for "information access" traffic, in its tariff argument SBC, basically, is trying to argue its way out of the well-settled rule that enhanced service providers are not carriers, but rather customers under federal law. *If* its tariff can be interpreted to cover information services traffic, then the tariff conflicts with this well-established body of law and is invalid. If the tariff cannot be interpreted this way, then SBC's argument is simply wrong. Finally, if it isn't clear — maybe the tariff applies, maybe it doesn't, you just can't really tell — then the tariff is invalid, and possibly even *void ab initio*, because it is vague and unclear.[245] Under *no* scenario, however, is SBC's tariff argument actually correct.

(2) SBC

As described above under IC Issue 3, section 251(b)(5) requires the payment of reciprocal compensation only for traffic that originates and terminates to end users physically located in the same local exchange area. While FX traffic works a fiction by

[245] *See* In The Matter Of Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., New York Telephone Company, And New England Telephone And Telegraph Company V. Global Naps, Inc., File No. E-99-22, FCC 99-381 Memorandum Opinion and Order (Rel. December 2, 1999)..

making a caller believe she is making a local call, in fact FX traffic originates and terminates in different local exchange areas. And, as the FCC has held, "section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area," while "[t]raffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges." Local Competition Order, ¶¶ 1034-35. Level 3's proposal to rate calls solely by NPA-NXX, without regard to the actual physical location at which the call terminates, simply does not reflect the FCC's rules.

Level 3 asserts that FX traffic should be treated as local traffic subject to section 251(b)(5) because "SBC's costs are limited to the cost of getting the calls to and from the POI, and remain the same regardless of the distance the traffic is carriers beyond the POI," and thus "SBC's costs associated with an FX call to a Level 3 customer are identical to the costs associated with any local call to a Level 3 customer." That proves nothing, because the same could be said of a call that SBC delivers to the POI that everyone agrees is clearly an interstate interexchange call, such as a traditional long distance call. Such a call may not entail different costs from SBC's perspective but, as a matter of law, such calls are not subject to reciprocal compensation under section 251(b)(5).

IC Issue 11(b) concerns compensation for the exchange of "Optional Calling Area" ("OCA") traffic. Appendix IC §§ 8.1, 8.2, 8.3. OCAs exist only in Arkansas, Kansas, and Texas, and thus these provisions do not apply here.

This issue, concerning whether it is appropriate to include all intraLATA toll traffic under a Meet Point Billing arrangement, is discussed under IC Issues 19 and 20.

This issue, concerning the appropriate compensation mechanism for 8YY traffic, is discussed under IC Issue 18.

These issues concern transiting, and are addressed under ITR Issues 5 through 9.

(3) Staff

SBC's proposed language for Appendix Intercarrier Compensation 7.2 incorporates the Commission's previously ordered treatment of VNXX or FX-like traffic into the agreement. Staff Init. Br. at 30, *et seq*. Accordingly, Staff recommends the Commission adopt SBC's proposed language for Appendix Intercarrier Compensation 7.2. Id.

Staff notes that the Commission has addressed this issue on a number of occasions, and the Commission has repeatedly determined that a "bill and keep" regime is proper. Staff Ex. 1.0 (Zolnierek) at 19 In Staff's view, nothing in the record in this proceeding compels a different conclusion. Staff Init. Br. at 30, *et seq*.

Staff observes that the Commission has ordered implementation of "bill and

keep" regimes for FX-like or VNXX traffic, based on stated policy goals of: (1) preserving the consumer benefits that coincide with the use of FX-like or VNXX arrangements, AT&T Arbitration Order at 124; and (2) preventing one LEC from subsidizing the FX-like or VNXX like offerings of another LEC. *Order on Rehearing* at 16, Global NAPs Illinois, Inc.: Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with Verizon North, Inc., f/k/a GTE North Incorporated and Verizon South, Inc., f/k/a GTE South Incorporated, ICC Docket No. 02-0253 (November 7, 2002). In Staff's opinion, these policy goals are as germane today as they were when the Commission issued its previous findings. Staff Init. Br. at 30, *et seq*. Furthermore, Staff notes that nothing in the FCC's recently released Core Forbearance Order requires the Commission to alter its previous determinations on these issues. Id.

Staff observes that, in the Core Forbearance Order, the FCC revisited its Section 251(b)(5) and ISP-bound traffic intercarrier compensation rules and regulations, and expressed a policy goal of unifying intercarrier compensation regimes. Core Forbearance Order, ¶23. Based on this policy, Staff notes, the FCC determined that ISP-bound traffic should be subject to a single rate rather than a bifurcated rate depending on whether it is existing versus new or growth traffic. Id., ¶24. Staff notes that, as such, the FCC adopted a single rate for a single type of traffic rather than two rates for the same type of traffic. Staff Init. Br. at 30, *et seq*.

Here, Staff avers, the circumstances are markedly different. Staff Init. Br. at 30, *et seq.* VNXX or FX-like traffic flows from a calling party in one local calling area to a called party in a separate local calling area and thus differs from traffic flowing from a calling party located in one local calling area to a called party located in the same local calling area. Id. Thus, in Staff's view, the FCC's *Core Forbearance Order* does not require, either implicitly or explicitly, that the Commission impose a single unified rate upon two disparate types of traffic. Id.

In Staff's view, adopting a unified rate for disparate types of traffic may be a laudable action in the course of reforming the entire system of intercarrier compensation. Staff Init. Br. at 30, *et seq.* However, the Commission is still required to make determinations in the proceeding navigating within a federal structure that imposes differing intercarrier compensation rates upon traffic, depending upon the jurisdictional nature of the traffic. Id. VNXX or FX-like traffic does not fit neatly into this existing system, and consideration of a policy goal of unifying rates does not assist in resolution of this problem. Id. The Commission has in the past struck a balance that preserves its policy goals and at this time, under the current federal intercarrier compensation structure, Staff recommends that the Commission maintain that balance as it has in the past. Id.

Similarly, Staff notes that the Commission has also determined previously that bill and keep should apply to ISP-bound VNXX or FX-like traffic. Staff Ex. 1.0 (Zolnierek) at 20. In making this finding, the Commission stated:

> In the ISP Remand Order, the FCC stated that where a state commission had instituted a bill and keep arrangement for ISP bound traffic, that arrangement would remain in place. In Illinois, we have repeatedly held that FX-like traffic is not subject to reciprocal compensation, but rather we have instituted a bill and keep regime. In our limited role of upholding FCC orders concerning ISP bound traffic, we conclude that the ISP bound FX traffic between AT&T and SBC will also be subject to bill and keep. To do otherwise would contradict the FCC's stated policy goals to reduce carriers' reliance on carrier to carrier payments. AT&T Arbitration Order at 120

Staff takes the view that the situation that obtains here is, based upon the record, no different from that which obtained in those proceedings where the Commission made its previous determinations, and that, accordingly, there is nothing here that should cause the Commission to alter its previous findings. Staff Init. Br. at 30, et seq.

With respect to the impact of the *Core Forbearance Order*, Staff notes that VNXX or FX-like ISP-bound traffic flows from a calling party in one local calling area to an ISP in a separate local calling area and is, therefore, similar to VNXX or FX-like traffic, which flows from a calling party in one local calling area to a called party in a separate local calling area. Id. Therefore, adopting a unified rate for these two types of traffic not only comports with previous commission findings but with the actions taken by the FCC in its Core Petition to unify similar traffic types. Id.

b) Analysis and Conclusions

Level 3 IC-11(a). This Commission has consistently determined that FX and FX-like traffic is governed by a bill-and-keep regime[246]. We have done so to retain the customer benefits of FX calling, while limiting the subsidization of FX calling by the provider's competitor (through the unbalanced flow of reciprocal compensation that would be associated with one-way foreign exchange). Nothing in the record here compels us to treat FX and FX-like traffic differently in this instance. Consequently, while SBC's reference to "Section 251(b)(5) Traffic" should be deleted in its proposed Section 7.2, SBC's bill-and-keep language should be included in the SBC/Level 3 ICA.

Additionally, the last sentence in SBC's 7.2 must be deleted. As we determined in the AT&T/SBC Arbitration, ISP-bound FX/FX-like traffic is subject to reciprocal compensation, not to a bill-and-keep regime[247]. That conclusion is consistent with the requirements of the ISP Compensation Order, discussed elsewhere in this Arbitration Decision. Accordingly, in view of SBC's election under the ISP Compensation Order,

---

[246] GNAPs-Verizon Arbitration at 17; AT&T-SBC Arbitration at 124.

[247] AT&T-SBC Arbitration at 132.

ISP-bound FX/FX-like traffic will be reciprocally compensated at the rate of $0.0007 per minute of use[248].

Level 3 IC-11(b). The Commission rejects inclusion of the term "Circuit Switched Traffic" in the ICA, for the reasons stated in our resolution of Level 3 Issue IC-2(k).

SBC IC-11(a). This sub-issue is substantively identical to Issue DEF-8. Therefore, the Commission's resolution of that issue also resolves SBC Issue IC-11(a).

SBC IC-11(c). The Commission's resolution of SBC sub-issues IC-19(b) and (c) applies to, and resolves, this sub-issue as well.

SBC IC-11(d). This sub-issue is substantively identical to sub-issue IC-18(b). Therefore, the Commission's resolution of that sub-issue also resolves Issue SBC IC-11(d).

SBC IC-11(e). Our resolution of SBC Issue ITR-5 applies to and resolves this sub-issue as well.

SBC IC-11(f). The parties state that they no longer need Commission resolution of this sub-issue.

12. IC-12 (Level 3) Should the agreement contain terms, conditions and rates for compensation for exchange of unbundled local switching in light of the FCC's Interim UNE Order?

(SBC)(12) What is the appropriate form of intercarrier compensation for Unbundled Local Switching Traffic?

a) Parties' Positions and Proposals

(1) Level 3

SBC proposes language related to the Intercarrier Compensation for Unbundled Local Switching Traffic. This issue will most likely be decided upon the Commission's deliberations related to UNE Issue 1 below. For purposes of consistency, Level 3 believes the Commission should not adopt SBC's language as the Interim Order adopted by the FCC maintains the status quo for UNEs that existed as of June 15, 2004. Once the FCC's final rules are in place, the parties can use the Change in Law

[248] The parties will need tracking arrangements for traffic subject to, respectively, reciprocal compensation and bill-and-keep. FX/ISP-bound traffic will have to be quantified apart from FX/non-ISP bound traffic, because it will be subject to a different compensation scheme. If the agreed-upon and arbitrated terms in the parties' ICA do not adequately address such tracking, the parties might constructively consider the tracking provisions, including the allocation factors, approved in the AT&T/SBC Arbitration at 130.

provisions of the agreement to modify the terms to address all UNE issues, including IC Issue 12. For this reason, the Commission should reject SBC's attempts to litigate UNE issues in this arbitration, and reject SBC's language in Intercarrier Compensation Appendix Sections 5.7, 5.7.1-5.7.4.

(2) SBC

IC Issue 12 concerns language proposed by SBC, and opposed by Level 3, that specifies the applicability of reciprocal compensation when Level 3 leases unbundled local switching ("ULS") from SBC. SBC's proposed Section 5.7.2 specifies that reciprocal compensation is due for interswitch section 251(b)(5) and ISP-bound traffic exchanged by the parties where Level 3 leases ULS from SBC. SBC's language is intended to ensure that UNE-P traffic is compensated the same as traffic that originates and/or terminates via a facilities-based provider. An interswitch call is one that travels between at least two switches. An intraswitch call, on the other hand, is originated and terminated by a single switch – *i.e.,* the calling and called party are both served by the same end office switch. In the case of an interswitch call where Level 3 leases ULS, compensation for section 251(b)(5) traffic and ISP-bound traffic is clearly due, because Level 3 uses its switch (leased from SBC) to originate the call, and SBC then terminates the call using SBC's switch (or vice versa). Requiring reciprocal compensation in such circumstances ensures that UNE-P traffic is treated in the same manner as the traffic of a facilities-based provider. If Level 3 actually owned the switch, rather than leasing it from SBC, there is no dispute that reciprocal compensation would apply.

In the case of an intraswitch call where Level 3 leases ULS, on the other hand, no compensation should be due, because there is no hand-off of the call from one party's switch to the other's. That is, there are no costs for the "terminating carrier" to recover, because there is no point of switching on the terminating carrier's network. Rather, the originating carrier's switch handles all the switching functions necessary to complete the call. *See* Local Competition Order*,* ¶ 1034 Again, SBC's proposal ensures that UNE-P traffic is compensated the same as traffic that originates and/or terminates via a facilities-based provider. If Level 3 actually owned the switch, rather than leasing it from SBC, and completed an intraswitch call using its switch, then no reciprocal compensation would be due to any carrier.

Level 3's objection to SBC's proposed Section 5.7.2 is without merit. Level 3 asserts that the FCC's Interim Order freezes the parties' existing contract terms regarding intercarrier compensation for traffic exchanged by the parties where Level 3 leases ULS. Level 3 is wrong.

The Interim Order requires SBC to continue for a limited time to provide CLECs unbundled access to mass market switching, high-capacity loops, and dedicated transport "under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004." Interim Order*,* ¶¶1, 21. In particular, "[t]hese rates terms, and conditions shall remain in place until the earlier of the effective

date of final unbundling rules promulgated by the [FCC] or six months after Federal Register publication of this Order." *Id*.[249] The Interim Order's "freeze" applies to the rates, terms, and conditions at which Level 3 is entitled to access mass market ULS. Intercarrier compensation, however, is not a rate, term, or condition of access to ULS. Rather, intercarrier compensation addresses the terms for the exchange of traffic between the parties. And nothing in the Interim Order indicates that the FCC intended to "freeze" rates, terms, or conditions for intercarrier compensation. [250]

Moreover, the 1996 Act draws a clear distinction between the rates and terms of access to UNEs, such as ULS, and the rates and terms governing intercarrier compensation, making clear that they are not one and the same. Section 251(b)(5) imposes a requirement on "all local exchange carriers" to establish "reciprocal compensation arrangements," while Section 251(c)(3) requires incumbent local exchange carriers to provide "unbundled access" to certain network elements. Similarly, Section 252(d)(1) contains the "pricing standards" "for network elements," while a different provision, Section 252(d)(2), contains standards for "charges for transport and termination of traffic."

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

The FCC's Status Quo Order, *supra,* requires ILEC's to continue providing ULS to CLECs pursuant to the terms in their existing ICAs as of June 15, 2004. SBC is apparently willing to do so, until the interim period defined in the Status Quo Order expires or is terminated by the FCC. Level 3, however, asserts that the Status Quo Order also freezes the parties' existing carrier compensation regime for ULS. That is incorrect. The Status Quo Order preserves Level 3's ability to purchase ULS from SBC as a TELRIC-priced UNE. It does not preserve intercarrier compensation arrangements for ULS or any other UNE. Level 3's position is rejected.

---

[249] Three exceptions apply: where the June 15, 2004 rates, terms or conditions are superseded by "(1) voluntarily negotiated agreements, (2) an intervening [FCC] order affecting specific unbundling obligations (*e.g.*, an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements." Interim Order, ¶¶ 1, 21.

[250] Even if the Interim Order's freeze did apply to intercarrier compensation terms, which it does not, that freeze would apply only to intercarrier compensation with respect to *mass market* switching, not enterprise switching. The FCC's interim rules do not apply to enterprise switching. At the outset of its Interim Order, the FCC made clear that its "references to unbundled switching encompass *mass market* local circuit switching," not enterprise switching. Interim Order, ¶ 1 n.3. And applying the interim rules to enterprise switching would make no sense. In the TRO, the FCC determined that CLECs are not impaired without access to enterprise switching, and thus enterprise switching is not subject to unbundling. *See* 47 C.F.R. § 51.319(d)(3). In *USTA II*, the D.C. Circuit *upheld* that determination. 359 F.3d at 587.

13. IC-13 (Level 3) For those states where SBC has elected to exchange ISP-Bound Traffic according to the FCC's plan adopted in the ISP Remand Order should the agreement reflect an already-agreed to compensation plan between Level 3 and SBC, which plan would be updated upon the soon expected Reciprocal Compensation Order from the FCC?

(SBC)(a) Should the Intercarrier Compensation Index include SBC's proposed terms and conditions concerning application of the FCC's ISP-Bound Compensation Plan?

(SBC)(b) Should the Agreement provide for a Growth Cap on compensation for Growth Cap on the compensation for ISP-Bound Traffic?

(SBC)(c) Should the Agreement provide for Bill and Keep for ISP-Bound traffic in New Markets?

(SBC)(d) Should the Agreement provide for a rebuttable presumption that if the "Section 251(b)(5) Traffic" and ISP-Bound Traffic exchanged between the Parties exceeds a 3:1 terminating to originating ratio, it is presumed to be ISP-Bound Traffic subject to the compensation and growth cap terms in Section 6.3?

(SBC)(e) Should terms and conditions be included in the Agreement that provide that the Party that terminates more billable traffic must calculate the amount of traffic to be compensated under the FCC plan and the amount of traffic that is subject to bill and keep?

a) Parties' Positions and Proposals

(1) Level 3

For the same reasons as discussed in IC Issue 10(c), (d) and (e) above, the Commission should make clear that the current ISP Compensation terms will remain in place until the FCC releases its ISP Remand Order. At that time, the parties can incorporate the FCC's findings into the agreement, without the need to invest in time or resources for a new ISP compensation plan that will only be in place a short while. The wiser course is for the Commission to hold the status quo until the FCC order is released and the parties can incorporate the terms into the agreement.

Level 3 also notes that certain of the FCC proposed language relating to ISP-Bound Traffic in New Markets (Section 6.4) and Growth Cap and New Market Bill and Keep Arrangements (Section 6.5) have been made null and void by the FCC's recent *Core Forbearance Order*. In that Order, the FCC announced that it would not apply

certain of its findings from the ISP Remand Order. Specifically, the FCC held that the Growth Cap and New Market Rules adopted in the ISP Remand Order that imposed a bill and keep regime for ISP-Bound traffic "are no longer necessary to ensure that charges and practices are just and reasonable, and not unjustly or unreasonably discriminatory."[251] These are the very same provisions in the ISP Remand Order upon which SBC relies in presenting its language in Sections 6.4 and 6.5 of the IC Appendix. SBC's attempts to inject such terms in the IC Appendix are clearly without merit, as demonstrated by the FCC's *Core Forbearance Order*.

For these reasons, the Commission should reject SBC's language in IC Appendix Section 6, 6.1, 6.2, 6.2.1, 6.2.2, 6.2.3, 6.3, 6.3.1, 6.3.2, 6.3.3, 6.4, 6.4.1, 6.4.2, 6.5, 6.5.1, 6.5.2, 6.6, 6.6.1,6.7 and 7.5.

(2) SBC

IC Issue 13(a) concerns SBC's proposed Section 6, which implements the ISP Remand Order's compensation plan for ISP-bound traffic (and section 251(b)(5) traffic, if Level 3 chooses to take advantage of the "mirroring" rule). Level 3 opposes implementation of the FCC's ISP-bound traffic compensation rules, basically asserting that the parties should not bother to implement the requirements of federal law with respect to ISP-bound traffic because those requirements may change in the near future. Instead, Level 3 asserts, the Commission should require the parties to re-adopt the provisions of their old contract governing ISP-bound traffic – provisions that were adopted by voluntary agreement and that manifestly do not reflect the FCC's ISP Remand Order (a point that Level 3 does not deny). Level 3's position is without merit, and violates federal law.

As explained under IC Issue 10, Level 3 has no choice in the matter. SBC has invoked the FCC's compensation plan for ISP-bound traffic, and thus the parties must conform to that plan.

Moreover, the FCC has recently confirmed that its ISP Remand Order remains the law today. In the *Core Forbearance Order,* the FCC refused to lift its rate caps for ISP-bound traffic, or its mirroring rule. The FCC reaffirmed "the continuing validity of the public interest rationale" behind its ISP Remand Order, and found "that the rate caps and mirroring rule remain necessary to prevent regulatory arbitrage and promote efficient investment in telecommunications services and facilities." *Core Forbearance Order,* ¶¶ 18-19. The FCC noted that "the rate caps and mirroring rule were implemented to prevent the subsidization of dial-up Internet access customers at the expense of consumers of basic telephone service, and to avoid arbitrage and discrimination between services," and concluded that "application of these rules is still 'necessary for the protection of consumers.'" *Id.* ¶ 25.

[251] Core Forbearance Order, ¶ 24.

In short, the FCC's rate caps and mirroring rule for ISP-bound traffic remain fully effective federal law today, and that law cannot be ignored as Level 3 proposes. Level 3's scofflaw proposal is especially inappropriate given the FCC's reaffirmation that the ISP-bound traffic rate caps remain "necessary for the protection of consumers" and "necessary to prevent regulatory arbitrate and promote efficient investment in telecommunications." *Id.* ¶¶ 19, 25.

In its recent Core Forbearance Order (¶ 1), the FCC granted forbearance to all carriers from application of the ISP Remand Order's "growth caps" for compensable ISP-bound traffic and its "new markets" rule. Thus, the parties' agreement should not reflect those growth caps or the new markets rule, and SBC withdraws Sections 6.3, 6.4, and 6.5 of its proposed language.

This issue concerns implementation the ISP Remand Order's so-called "3:1 ISP presumption." In the ISP Remand Order (¶ 79), the FCC recognized "that some carriers are unable to identify ISP-bound traffic." To "limit disputes and avoid costly efforts to identify this traffic," the FCC "adopt[ed] a rebuttable presumption that traffic delivered to a carrier, pursuant to a particular contract, that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic that is subject to the compensation mechanism set forth in [the ISP Remand Order]." *Id.* The FCC made clear that the 3:1 presumption may be rebutted in proceedings before the state commission.

SBC proposes contract language that implements the ISP Remand Order's 3:1 presumption. SBC § 6.6.1. Level 3 has not articulated any objection to this language, except for its general position that the parties should reprise the terms of their old contract rather than implement the ISP Remand Order. As explained above, Level 3's proposal is unlawful, and SBC's proposed language should be adopted.

Each party should be responsible for tracking and recording the traffic that party transports and terminates. In Section 6.7, SBC proposes that, each month, the party that transports and terminates more "billable traffic" (defined as all Section 251(b)(5) and ISP-bound traffic) will be responsible for calculating the amount of such traffic to be compensated and for invoicing the other carrier for the appropriate amount of compensation due. Level 3 has not objected to this language, except for its general position that the parties should repeat the terms of their old contract rather than implement the ISP Remand Order. As explained above, Level 3's proposal is unlawful, and SBC's proposed language should be adopted.

(3) Staff

Staff recommends that SBC's proposal should be accepted. Staff Init. Br. at 25 et seq. Staff notes that in the event that all Section 251(b)(5) and ISP-bound traffic is exchanged at a uniform rate (as recommended by Staff), there will be no need for the parties to separately identify Section 251(b)(5) and ISP-bound traffic. Id. Therefore, acceptance of SBC's proposal may have no impact on the contract. Id. However, if Level 3 seeks separate rates for Section 251(b)(5) and ISP-bound traffic, this provision will be relevant. Id. Because of this possibility Staff recommends retaining language

appropriate to address this eventuality, despite the high probability that it will be rendered irrelevant by other terms and conditions of the contract. Id.

In order to implement Staff's proposal the Commission should order the parties to include SBC's proposed Appendix Intercarrier Compensation, Section 6 in their contract, as amended in Staff's Initial Brief at 31-33. Staff notes that its proposal incorporates the $0.0005 per minute of use rate recommended by Staff in Issue IC–10 above. Staff Init. Br. at 30.

b) Analysis and Conclusions

Level 3 IC-13. SBC is correct that this Commission must apply the law as it exists at the time than an arbitration decision is rendered. Insofar as SBC position correctly reflects the FCC's ISP-bound traffic rules, it should be adopted. If the FCC alters applicable law thereafter, the parties should resort to the change-of-law provisions in their ICA to incorporate such changes, insofar as the FCC so requires.

SBC 13(a). SBC's proposal accurately implements requirements in the ISP Remand Order. It is therefore generally approved. However, SBC's proposed text must be revised, for reasons articulated in connection with Issues DEF-18 and IC-3, by replacing "Section 251(b)(5) Traffic" with either "Telephone Exchange Service Traffic" or "Local Traffic."

SBC-IC-13(b). In view of the FCC decision in Core Forebearance Order, SBC has withdrawn its proposed contract language pertaining to "growth caps." This issue is now moot.

SBC IC-13(c) In view of the FCC decision in Core Forebearance Order, SBC has withdrawn its proposed contract language pertaining to "new markets." This issue is now moot.

SBC IC-13(d). SBC's proposal accurately implements requirements in the ISP Remand Order. Level 3 offers no specific objection to SBC's proposal. SBC's proposal is therefore generally approved. However, SBC's proposed text must be revised, for reasons articulated in connection with Issues DEF-18 and IC-3, by replacing "Section 251(b)(5) Traffic" with either "Telephone Exchange Service Traffic" or "Local Traffic."

SBC 1C-13(e.) SBC proposes that the party transporting and terminating more billable traffic should bear the responsibility of quantifying the traffic in the pertinent categories and submitting an invoice to the other party. The Commission presumes that Level 3, with its customer base of information providers, will terminate the majority of intra-carrier traffic. Since Level 3 offers no particular objection to SBC's proposed allocation of responsibility to Level 3, that proposal is approved. However, for reasons enunciated elsewhere in connection with Issues DEF-18 and IC-3, "Section 251(b)(5) Traffic" should be replaced with "Telephone Exchange Service Traffic" or "Local Traffic."

14. IC-14 (Level 3) Should this Agreement recognize in a neutral manner that intercarrier compensation mechanism contained in state and federal tariffs may or may not apply to traffic exchanged between the parties?

(SBC) Should this Agreement specifically provide that reciprocal compensation does not apply to interstate or intrastate exchange access traffic, Information access traffic, exchange services for access, or any other type of traffic found by the FCC or the Commission to be exempt from reciprocal compensation?

a) Parties' Positions and Proposals

(1) Level 3

As detailed above in IC issues 1 and 2, the FCC issued its ruling in the *Pulver.com* and *AT&T IP* proceedings. Consistent with the FCC's findings in those proceedings related to the application of access charges to IP-Enabled Traffic, Level 3's proposed language comports with the FCC holding that Telecommunications Traffic that is governed by the terms of the Parties' tariffs will be governed by those tariffs, subject to Applicable Law. IP-Enabled Traffic is categorized by the FCC as information services and not subject to access charges because the traffic undergoes a net protocol conversion (i.e., IP-PSTN traffic).

The net effect of SBC's language is to improperly apply access charges on Level 3's IP-Enabled Traffic, which is in direct conflict with the FCC's findings in the above cited cases. In light of that fact, the Commission should reject SBC's language in IC Appendix Section 7.1, and adopt Level 3s sustainable proposal.

(2) SBC

As described above, Section 251(b)(5) "does not mandate reciprocal compensation for 'exchange access, information access, and exchange services for such access.'" ISP Remand Order ¶ 34. And this exclusion applies to "all traffic" "that travel[s] to points – both interstate and intrastate – beyond the local exchange," and preserves both the interstate and intrastate "access regimes applicable to this traffic." *Id.* ¶ 37. See also id. n. 66 ("Section 251(b)(5) "exclude[s] traffic subject to . . . intrastate access regulations" as well as interstate access regulations). Instead, such traffic remains subject to intrastate and interstate access tariffs.

SBC's proposed contract language properly implements this federal law, by specifying that "the compensation arrangements set forth in Section 5 and 6 of this Appendix [for Section 251(b)(5) and ISP-Bound Traffic] are not applicable to (i) interstate or intrastate Exchange Access traffic, (ii) Information Access traffic, (iii) Exchange Services for access or (iv) any other type of traffic found to be exempt from reciprocal compensation by the FCC or the Commission, with the exception of ISP-

Bound Traffic which is addressed in this Appendix." SBC § 7.1. Further, "[a]ll Exchange Access traffic and IntraLATA Toll Traffic shall continue to be governed by the terms and conditions of applicable federal and state tariffs." This language is directly supported by the FCC's currently effective rules, SBC explains, and Level 3 has failed to articulate its objection to this language.

Instead of making clear that reciprocal compensation does not apply to exchange access, information access, or exchange services for access, Level 3 proposes vague language stating that traffic that "is governed by the terms, rates and conditions contained in either party's filed and effective federal or state tariffs . . . will be governed by the rates, terms and conditions of either Party's tariff or of Level 3's terms, rates and conditions subject to Applicable Law." L3 § 7.1. While it is not entirely clear what the reference to "Level 3's terms, rates and conditions" means, it appears that Level 3's language says nothing more than 'traffic governed by a tariff will be governed by a tariff.' This vague language should be rejected, because it utterly fails to clearly and unambiguously implement the FCC's effective rule that reciprocal compensation does not apply to "exchange access, information access, and exchange services for such access." ISP Remand Order ¶ 34.

(3) Staff

In the Staff's view, Level 3's proposed contract language for this issue lacks clarity, to the extent that it could, if adopted, nullify much of the rest of the ICS, since its reference to "tariffs" would include almost any imaginable service or element. Staff Init. Br. at 33-35. SBC's proposal is preferable, with the exception of its recommendation that language be included specifying that all exchange access traffic and intraLATA toll traffic will be governed by the terms and conditions of applicable federal and state tariffs, since this could be interpreted to override any specific provisions regarding exchange access or intraLATA toll traffic that are included in the final ICA. Id.

Accordingly, Staff recommends adoption of SBC's language for Appendix Intercarrier Compensation, Section 7.1, with the following modifications in underline / strikeout format:

> *The compensation arrangements set forth in Sections 5 and 6 of this Appendix are not applicable to (i) interstate or intrastate Exchange Access traffic, (ii) Information Access traffic, (iii) Exchange Services for access or (iv) any other type of traffic found to be exempt from reciprocal compensation by the FCC or the Commission, with the exception of ISP-Bound Traffic which is addressed in this Appendix. All Exchange Access traffic and IntraLATA Toll Traffic shall continue to be governed by the terms and conditions of applicable federal and state tariffs unless otherwise specified within this Agreement, but only to the extent the tariffs are applicable to the exchange of the specific exchange access traffic and intraLATA toll traffic*. Staff Init. Br. at 34-35

b) Analysis and Conclusions

Level 3's proposed text contains unacceptably vague elements that render it unsuitable for the parties' ICA. Since "Level 3's terms, rates and conditions" are distinguished from Level 3's tariffs, the Commission cannot determine what they might be. Also, as we emphasize elsewhere in this Arbitration Decision, the term "applicable law" is both potentially disputatious and logically unnecessary (law is applicable whether or not the parties declare it so). Additionally, Level 3 does not wish to limit the parties to state and federal law, but the Commission is unaware of any other sovereign governing intrastate telecommunications. Again, Level 3's principal concern appears to be shielding IP-enabled services from access charges. In our resolution of Issue IC-2(a), we concluded that IP-enabled services will not be addressed in the parties' ICA (except to specifically exclude them).

Staff recommends adding clarifying language to Section 7.1 so that specific ICA provisions regarding exchange access and intraLATA toll traffic are not inadvertently undermined. Staff Init. Br. at 35. SBC accepts Staff's recommendation. Accordingly, we approve SBC's text with Staff's modification.

15. IC-15 (Level 3) Should higher intercarrier compensation rates contained in SBC's state or federal tariffs apply to ISP-bound traffic or calls bound to the Internet where SBC physically hands off such traffic to Level 3 within the same LATA (and often within the same local calling area or at least at the tandem to which such call's end office subtended) in which SBC originated such traffic?

(SBC) What is the appropriate treatment and compensation of ISP traffic exchanged between the Parties outside of the local calling scope?

a) Parties' Positions and Proposals

(1) Level 3

SBC's language in Sections 7.4 and 7.5 of the IC Appendix assumes that ISP-Bound traffic can be treated as if it was rated as either a local or toll call. The FCC's ISP Remand Order precludes re-rating such ISP-Bound Traffic. Per the FCC's determinations in the ISP Remand Order, ISP-Bound Traffic is interstate traffic subject to a single form of compensation. As SBC has opted into the FCC ISP compensation regime pronounced in the ISP Remand Order in all states but Connecticut, and applying the single form of compensation, SBC's language in Sections 7.4 and 7.5 is inapplicable. The Commission must reject SBC's attempts to recast the FCC's findings in the ISP Remand Order, and reject SBC's language in IC Appendix Sections 7.4 and 7.5.

(2) SBC

As described above under IC Issue 5, the ISP Remand Order addressed only ISP-bound traffic *within* the local calling scope – i.e., a call from an end-user to an ISP in the same local calling area. The question the FCC resolved was "whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end-user customer to an ISP in the same local calling area." ISP Remand Order ¶ 13 (emphasis added). The FCC ruled that such ISP-bound traffic is subject to the compensation rules promulgated in the ISP Remand Order, and SBC has proposed contract language (the subject of other issues) implementing those rules.

The parties' contract should also address the treatment of ISP traffic *not* covered by the FCC's ISP Remand Order – that is, traffic bound to an ISP outside the local calling area (as would occur if an end-user called long distance to its ISP). SBC has proposed such language (§§ 7.4 and 7.5), while Level 3 has not. SBC's proposed language is consistent with federal law, and should be adopted.

(3) Staff

Staff notes that SBC proposes inclusion of clarifying language in Appendix Intercarrier Compensation Section 7.4 and 7.5 that specifies the proper treatment of ISP-bound traffic provided, for example, under FX-like or through traditional LEC-IXC-LEC arrangements. Staff Init. Br. at 35. In Staff's view, such a provision would clarify, for example, that when an SBC customer places a call to an ISP both located outside the callers local calling and with a telephone number outside the local calling area that any intermediate carrier performing what is essentially long distance transport would not be eligible for reciprocal compensation at the rate specified in Appendix Intercarrier Compensation Sections 5 and 6, but would rather be responsible for switched access charges. Id. This clarifying language is consistent with the treatment Staff recommends for the various types of ISP-bound traffic and adds clarity to the contract. Id. Therefore, Staff recommends that the Commission adopt SBC's proposed language in Appendix Intercarrier Compensation Sections 7.4 and 7.5. Id.

b) Analysis and Conclusions

This issue concerns compensation for ISP-bound traffic when the ISP is not physically located in the same local calling area as the caller and provides no FX or VNXX number in that calling area. The principles articulated for Issue DEF-8 apply here as well. As we said with regard to that issue, for the purposes of intercarrier compensation among interconnected LECs, all ISP-bound traffic is alike under the analysis of the ISP Remand Order. Consequently, SBC should not collect access charges when it delivers ISP-bound traffic to the single or multiple POIs that Level 3 will established in each LATA pursuant to Appendix NIM Section 2.1. As we determine elsewhere in this Arbitration Decision, the parties will pay intercarrier compensation for all ISP-bound traffic at the rate of $0.0007/minute of use, unless and until the FCC requires something else.

16. IC-16 – Not an Illinois issue.

17. IC-17 Resolved by the parties.

18. IC-18 (Level 3)(a) For intraLATA 800 calls, should the Agreement require exclusive adherence to a single format or allow the parties to mutually agree to alternative formats to accommodate technological changes?

(SBC)(a) For intraLATA 800 calls, should the Agreement require the parties to provide 800 Access Detail Usage, or should it permit the parties to provide the equivalent?

(Joint Issue)(b) What is the appropriate treatment and form of intercarrier compensation for intraLATA 8YY traffic that bears translated NPA-NXX codes that are local to the point where the traffic is exchange?

a) Parties' Positions and Proposals

(1) Level 3

This issue is directly linked to IC Issue 8 above. SBC's definition of Switched Access Traffic, as presented in ITR Appendix Section 12.1, should not be included in the agreement. SBC's definition imposes a requirement that the definition include traffic that originates from the end user's premises in IP format and is transmitted to the switch of a voice communications provider when such switch utilizes IP technology, also known as IP-PSTN. To top it off, once SBC has deemed Level 3's traffic as Switched Access Traffic, the traffic is subject to SBC's access charges.

SBC's attempt to lump IP-Enabled Traffic into the definition of Switched Access Traffic is contrary to federal law, and an attempt by SBC to puff its access revenues with an additional source of funding. As explained in the discussions related to Intercarrier Compensation, there is no FCC order, rule or regulation that concludes that Level 3 should pay access charges when an SBC customer terminates a call to a Level 3 IP customer. Just the opposite. In the *Worldcom Order*, the US Court of Appeals for the District of Columbia held that Section 251(g) of the Act preserves the pre-1996 Act access charge rules. Because there was no pre-1996 access charge rule governing intercarrier compensation for IP-Enabled service traffic, such traffic must be exchanged at cost-based rates pursuant to Section 251(b)(5) of the Act.

In light of these facts, SBC's attempts to lump IP-Enabled Traffic into its misguided definition of Switched Access Traffic, done in an attempt to impose access charges on Level 3's traffic, violates federal law. The Commission must reject SBC's language in ITR Appendix 12.1, and ensure that IP-Enabled Traffic is not subject to any form of access charge.

As detailed above, Level 3 does not believe that either party contests the fact that an SBC end user calling a Level 3 end user across the street, or anywhere in the SBC local calling area for that matter, would result in Level 3 assessing SBC reciprocal compensation for terminating that SBC call. Under the rating guidelines in effect for years, the rating of a particular call is based upon the NPA-NXX''s of the calling parties. As a "local" NPA-NXX, the call is deemed local in nature and subject to reciprocal compensation.

The same is true of any 8YY call that is local in nature – i.e., the NPA-NXX associated with a particular 8YY number is assigned to a local calling area. In these situations, the call must be deemed "local" in nature, and subject to the reciprocal compensation requirements imposed on any other local call. As discussed in detail above, historically the industry standard has been that the determination as to whether a particular circuit switched TDM call is local or non-local is based upon the NPA-NXX of the calling parties. If the NPA-NXX indicates that the call is terminating at a customer within the local calling area, then the call is local in nature and subject to the appropriate reciprocal compensation. If the NPA-NXX comparison shows termination of the circuit switched TDM call is at a non-local customer, then the call is access traffic. At no point in time has the physical location of the calling parties been a determinative factor in the rating for that call. SBC's proposal replaces this time-honored rating methodology with a vast new one relying on the physical location of the calling parties.

Further, as also described in detail above, with IP-Enabled Traffic, the physical location of the calling parties is not relevant. Rather, as in the case with circuit switched TDM compensation in the past, the NPA-NXX of the calling parties will determine the rating of a call. This is precisely the regime recommended by Level 3, and the Commission should adopt Level 3's proposals in IC Appendix Section 11.2.

(2) SBC

When one carrier provides services to another carrier, it often provides detailed information to that carrier regarding the service provided so that the receiving carrier can verify the provider's bill (and, if appropriate, bill its own end users in turn for the service). Given the sheer number of carriers that provide services to and interact with other carriers in this fashion, inter-carrier communications would quickly degenerate into Babel unless all carriers agreed upon and used common formats. Accordingly, carriers participate in the Ordering and Billing Forum (which is open to all interested parties) to develop industry-wide formats for exchanging billing information. The alternative is chaos – a world in which every carrier develops its own "language" and then has to learn and keep track of all the dialects spoken by all the other carriers with which it does business.

With its proposed language for this issue, Level 3 is attempting to evade the order that the industry has worked hard to create and to replace it with chaos. When Level 3 asks or "queries" SBC's database of "800" numbers to locate a customer, SBC's switch records the request. The recording is translated into the industry format developed by the Ordering and Billing Forum. This format is called Exchange Message

Interface or "EMI." SBC then sends the EMI formatted record to Level 3 so that Level 3 can verify its bill from SBC or bill its own end user for triggering the query. In Section 11.1 of the Agreement, SBC proposes that the parties provide each other with 800 Access Detail Usage information and IntraLATA 800 Copy Detail Usage in the standard EMI format. Level 3, however, wants to water down the standard, proposing that the parties can provide "equivalent" information in some "other mutually agreeable format."

The problem with Level 3's proposal is that there is no "equivalent" or "mutually agreeable" format, and Level 3 does not identify one. The whole reason that carriers establish industry standard-setting bodies, and then spend time participating in those organizations, is to create a *single* "agreeable" format, so that carriers know in advance what language to learn and use. SBC states that it has designed its systems to work with the industry-standard format, and that any new, non-standard format would require extensive modification to SBC's billing systems. SBC accordingly asks the Commission to reject Level 3's proposal.

IC Issue 18B concerns "8YY" traffic. The term "8YY" refers generically to toll-free numbers like the familiar "800" service. 8YY service is an optional Feature Group D service available to carriers from SBC's access tariffs, and it enables calling parties to reach the 8YY subscriber (e.g. a national rental car company) without having to incur toll charges. As such, the overwhelming majority of traffic that goes to 8YY subscribers is likely to be toll traffic (as opposed to local traffic). Therefore, 8YY traffic should be assessed access charges (in lieu of reciprocal compensation).

Level 3 contends that it should not pay access charges but should instead receive intercarrier compensation from SBC, if the 800 number can be "translated" to an "NPA-NXX" phone number that looks local to the point where the traffic is exchanged. But that approach virtually invites gaming. Further, by looking for traffic that appears "local to the point where the traffic is exchanged," Level 3's proposal ignores the reality that a call may be exchanged between several carriers, and that the true origin may not be local (and indeed, almost certainly is not local given the nature of 8YY calling). Finally, Level 3 already obtains compensation for 8YY traffic from its 8YY subscribers, by charging them a fee for 8YY service (the same way that SBC receives fees from its own 8YY subscribers).

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

Level 3 IC-18(a) & SBC IC-18(a). Level 3 identifies no "equivalent" format and, indeed, does not prove that one exists. SBC avers that any new and non-standard billing format would require substantial modification to its billing systems. SBC Ex. 9.0 at 6. On this record, there is no basis for approving Level 3's proposed language.

Joint IC-18(b). This sub-issue apparently involves the now-familiar dispute in this proceeding about whether the geographic location of the parties to a call, or the NPA-NXXs involved in that call, should determine intercarrier compensation[252]. In the context here, the called party would have an 8YY number that Level 3 would link to an underlying NPA-NXX in an FX-like arrangement at the point of call handoff. Although SBC is concerned about the potential for CLEC "gaming" (presumably by a CLEC that might opt into the Level 3/SBC ICA, rather than by Level 3), the Commission does not find that SBC's concern outweighs the efficiencies and (CLEC) cost and (customer) price reductions associated with FX-like arrangements. Consistent with other rulings in this case, we will not subject FX-like 8YY traffic to access charges.

However, the Commission understands that 8YY traffic is one-way traffic to the called party, and that the flow of intercarrier compensation will be one-way as well. Accordingly, since we hold elsewhere in this Arbitration Decision (and as we have repeatedly held in other proceedings) that non-ISP bound FX and FX-like arrangements are subject to bill-and-keep, the 8YY traffic involved here should be treated identically. However, any actual local 8YY (i.e., calls in the same local calling area, without involvement of an FX-like arrangement) should be subject to reciprocal compensation.

19. IC-19 (Level 3)(a) Should the Agreement require the parties to use only MECAB and MECOB billing formats as the exclusive format, or allow the parties to mutually agree to alternative formats to accommodate technological changes?

(Level 3)(b) Should the agreement contain terms that allow the parties to properly apply state and federally tariffed rates, terms and conditions to traffic while ensuring that these terms are not misapplied to IP Enabled Services?

(SBC)(a) Is Level 3 required to follow MECOD and MECAB billing format for Meet Point Billing?

(SBC)(b) What is the appropriate form of Intercarrier compensation for MPB Traffic?

(SBC)(c) It is appropriate to limit Meet Point Billing Arrangements to IXC Switched Access Services traffic jointly handled by the Parties?

[252] We say "apparently" because the parties have agreed, in proposed Section 11.2, that "[b]illing shall be based on originating and terminating NPA/NXX." Physical location is not mentioned. Nonetheless, based on Level 3's proposed addition to 11.2, we assume that "terminating NPA/NXX" refers to an underlying telephone number associated with the called party at its geographic location and not to an FX-like 8YY arrangement.

(SBC)(d) In the event of a loss of data, what is a reasonable time frame for both Parties to reconstruct the lost data?

a) Parties' Positions and Proposals

(1) Level 3

This issue is directly linked to IC Issue 8 above, and should be decided accordingly.

AT&T IP proceedings. Consistent with the FCC's findings in those proceedings related to the application of access charges to IP-Enabled Traffic, Level 3's language that comports with the FCC holdings related to Circuit Switched Traffic and Meet Point Billing. Under the FCC's Pulver.com and AT&T IP orders, the FCC has held that IP-Enabled Traffic is not Circuit Switched Traffic. Rather IP-Enabled Traffic is interstate information services, not subject to access charges. Level 3's language accounts for the fact that IP-Enabled Traffic undergoes a net protocol conversion (i.e., IP-PSTN traffic), making it a non-Circuit Switched form of information service, and not subject to access charges. For compensation of Circuit Switched Traffic, Level 3 proposes that it be governed by a Meet Point Billing basis.

The net effect of SBC's language applying Switched Access Traffic is to attempt to apply access charges on Level 3's IP-Enabled Traffic, which is in direct conflict with the FCC's findings in the above cited cases. In light of that fact, the Commission should reject SBC's language in IC Appendix Sections 12.1, 12.2, 12.3, 12.5, 12.6 and 12.9, and adopt Level 3s legally sustainable proposal.

(2) SBC

As with Issue 18A, IC Issue 19A concerns Level 3's attempt to evade industry standards for the exchange of information between carriers. For Meet Point Billing information (see issues 17 and 19B), SBC points out that the Ordering and Billing Forum has developed an industry standard known as "Multiple Exchange Carrier Access Billing" or "MECAB." The standard was written by industry participants in an open forum.

The agreed language for Sections 12.2, 12.3, 12.5, and 12.7 provides that the parties are to exchange information in the MECAB format. Level 3, however, proposes that Section 12.1 contain an exception, stating that the parties will "explore additional options" if "Level 3 is unable to provide records formatted according to [MECAB]." As with IC Issue 18A, SBC Level 3's proposal should be rejected because there are no "additional options" short of a customized format for Level 3 – which would defeat the purpose of having and abiding by industry standards in the first place.

As noted under IC Issue 17, intraLATA toll calls can be grouped into two categories. If the end user making the call has selected or "presubscribed" an interexchange carrier to carry its intraLATA toll traffic, the caller's local exchange carrier

takes the call to the toll carrier, which delivers the call to the called party's local carrier for termination. The toll carrier bills the end user; the two local carriers charge the toll carrier for access to their networks, and they share the access revenues under a "Meet Point Billing" arrangement. Alternatively, if the caller does not have a interexchange carrier for intraLATA toll, their local carrier takes the call to the local carrier that serves the call's recipient. Under this second scenario, known as "LEC-to-LEC traffic," the caller's carrier bills the caller, and compensates the recipient's carrier for terminating the call.

Level 3's proposed language for Sections 12.1, 12.2, 12.3, and 12.5 accounts for only one of these categories. Level 3 proposes that all "Circuit Switched Traffic" is to be handled via Meet Point Billing. But, Meet Point Billing is a method for sharing access revenues. Plainly, it does not and cannot apply where there are no access revenues to share (that is, where there is no third-party toll carrier in the middle of the call). Level 3 is ignoring LEC-to-LEC traffic. By contrast, SBC's proposed language properly limits Meet Point Billing to "Switched Access" traffic, where the parties share access revenues and where Meet Point Billing is applicable.

SBC has accepted Level 3's proposed 90-day period for this issue, so there should be no remaining dispute.

(3) Staff

Staff takes no position on this issues.

b) Analysis and Conclusions

Level 3 IC-19(a) & SBC IC-19(a). Level 3's proposed text does not assure that the carriers will use any particular record format for meet point billing at the outset of their operations under the new ICA. Rather, in proposed Section 12.1, Level 3 states that to whatever extent it might be "unable" to follow MECAB guidelines, "the parties would agree to explore additional options." As a result, neither this arbitration nor the ensuing ICA would definitively identify the format the parties would use when operations commenced pursuant to their next ICA. That uncertainty is not acceptable to the Commission. Accordingly, SBC'S proposed text for 12.1 is approved.

Level 3 IC-19(b). The answer to the general question posed by Level 3 is "yes," since the question addresses terms that are pre-defined by Level 3 as "misapplied." The utility of that self-evident proposition in this arbitration is not apparent to the Commission. To the extent Level 3 is referring to its proposed insertion of the term "Circuit Switched Traffic," we have rejected inclusion of that term in the ICA, for the reasons stated in our resolution of Level 3 Issue IC-2(k). To the extent Level 3 is addressing its proposed reference to "Applicable Law," the Commission disapproved of that term in our resolution of Issue GTC-6.

SBC IC-19(b) & (c). Meet Point Billing is a mechanism by which LECs share access revenues received from third-party carriers for call origination and termination.

IntraLATA, "LEC-to-LEC" traffic, involving no access charges from a third-party carrier, is not subject to Meet Point Billing. The parties' ICA should reflect these principles.

20. IC-20 (Level 3) Should the compensation under this Agreement apply to interstate or intrastate exchange access traffic, Information access traffic, exchange services for access, or any other type of traffic which is interstate in nature?

(SBC)(a) What is the proper treatment and compensation for IntraLATA toll traffic?

(SBC)(b) Should Level 3 be permitted to charge an Access rate higher than the incumbent?

(SBC)(c) Is Level 3 eligible to charge a tandem interconnection rate for intraLATA toll traffic?

a) Parties' Positions and Proposals

(1) Level 3

As detailed above in IC issues 1 and 19(b), the FCC has held that IP-Enabled Traffic is not circuit switched traffic, but rather is a non-Circuit-Switched form of information service, and not subject to access charges. Level 3's language is a more accurate reflection of the FCC's findings on rating of IP-Enabled Traffic. As such, the Commission should adopt its language in IC Appendix Section 14.1, which incorporates the results of the FCC's holdings discussed herein and follows the FCC's rules on net protocol conversion. SBC's attempts to lump these IP-Enabled (information) services into SBC's access tariffs and rate regime is inappropriate and contrary to the FCC's mandates.

(2) SBC

IC Issue 20(a) concerns Level 3's proposal to use its narrowly-defined term "Circuit-Switched Traffic." As described above under IC Issues 2 and 3, Level 3's proposed language is inappropriate, and should be rejected. Intrastate access charges apply to all intrastate intraLATA toll traffic, and not just intraLATA toll traffic that meets Level 3's narrow definition of "Circuit-Switched Traffic."

IC Issue 20(b) concerns SBC's proposed language in Section 14.1 stating that compensation for intraLATA toll traffic "shall not exceed the compensation contained in [the SBC] tariff in whose exchange area the End User is located." This language is intended to prevent Level 3 from charging an access rate for intraLATA toll traffic that is higher than SBC's own tariffed rate. This language is appropriate and should be adopted, while Level 3's objection to this language is without merit.

Level 3 is in effect asking the Commission to require SBC to pay Level 3 a per-minute access rate that Level 3 has supported with no evidence, that may or may not be cost-based, that is unregulated, and that Level 3 could change at any time. Level 3's request is untenable and must be rejected.

First, the record in this case does not contain any evidence as to what Level 3's switched access tariffed rates are, or whether they are cost-based, or whether they are same as its interstate access rates. What is clear is that Level 3 is free to change its intrastate switched access tariff rate at any time without SBC or Commission approval. That fact alone should be a sufficient basis for not requiring SBC to pay Level 3's intrastate switched access tariff rate, no matter its level. The FCC's thinking on CLEC tariffed access rates, as expressed in the Seventh Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 96-262, In the Matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers (rel. April 27, 2001), is instructive. There, the FCC found that:

- Application of the FCC's tariff rules to CLEC access services must be limited "in order to prevent use of the regulatory process to impose excessive access charges" (Order ¶ 2);

- Some CLECs have used the tariff system "to set access rates that were subject neither to negotiation nor to regulation designed to ensure their reasonableness. These CLECs have then relied on their tariff to demand payment from IXCs for access services that the long distance carriers likely would have declined to purchase at the tariffed rate." (*Id.*);

- The FCC needed "to eliminate regulatory arbitrage opportunities that previously have existed with respect to…CLEC access services." (*Id.*¶ 3);

- CLEC access rates should "decrease over time until they reach the rate charged by the incumbent LEC." (*Id.* ¶ 4);

- The FCC's previous regime "has often failed to keep CLEC access rates within a zone of reasonableness." (*Id*. ¶ 25);

- "[C]ertain CLECs…have refused to enter meaningful negotiations on access rates, choosing instead simply to file a tariff and bind [those] receiving their access service to the rates therein." (*Id.*¶ 28);

- "[T]here is ample evidence that the combination of the market's failure to constrain CLEC access rates [and other factors] create an arbitrage opportunity for CLECs to charge unreasonable access rates." (*Id*. ¶ 34).

In light of this powerful indictment by the FCC of CLEC access rates, there is no legitimate basis for requiring SBC to pay Level 3's unstated, unsupported, and changeable-at-will rates. Instead, SBC should pay Level 3's tariffed switched access rates only so long as they are not higher than SBC's own tariffed switched access rates.

Further, there is a compelling logic to SBC's proposal: under the FCC's rules, SBC pays Level 3 reciprocal compensation for local traffic at rates equal to the rates that SBC charges Level 3 for terminating Level 3-originated traffic. 47 C.F.R. § 51.711. The principal rationale for Rule 711 is that SBC's costs for transporting and terminating local traffic are a reasonable proxy for Level 3's costs for performing the same functions. Local Competition Order ¶ 1085. That same rationale, applied to intraLATA toll traffic, leads to the conclusion that SBC's tariffed switched access rates are a reasonable proxy for the rates that Level 3 should charge SBC for performing the same service, such that SBC should not have to pay Level 3 intraLATA toll access charges that are higher than SBC's own charges.

IC Issue 20(c) concerns Level 3's proposal to charge tandem rates for intraLATA toll traffic not just where Level 3's tandem switch is used to terminate traffic, but also where any "switch providing equivalent geographic coverage" is used to terminate traffic. L3 § 14.1. Level 3's language is inappropriate, and should be rejected. The rate that Level 3 charges for intraLATA traffic is governed by Level 3's applicable switched access tariff, and Level 3 should charge the applicable rate elements as allowed by their tariff.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

Level 3 IC-20(a) & SBC IC-20(a). In our resolution of Issue ITR-18(d), above, which incorporated our resolution of Issue DEF-3, we determined that a definition of "Circuit-Switched Traffic" is unnecessary, and even detrimental, to the parties' ICA. Therefore, Level 3's proposed insertion of "Circuit-Switched Traffic" is rejected, and we will SBC's proposed Section14.1 for application to intraLATA toll traffic that is not IP-enabled.

SBC IC-20(b). We agree with SBC that Level 3's switched access rate for intraLATA toll should not exceed the corresponding rate in SBC's tariffs. Customer welfare will not be promoted by allowing Level 3, which presents itself as a state-of-the-art carrier, to levy higher access charges, at least without proof that higher charges are cost-based. Level 3 offers no proof on that point in this proceeding. We reached a similar result in the TDS/Ameritech Arbitration[253], for similar reasons.

SBC IC-20(c). The Commission concurs with SBC that Level 3's rate for intraLATA traffic "is governed by Level 3's applicable switched access tariff, and Level 3 should charge the applicable rate elements as allowed by tariff." SBC Init. Br. at 131.

[253] TDS/Ameritech Arbitration, Docket 01-0338, Order, Aug. 8, 2001 at 50.

21. IC-21 (Level 3) Should the agreement contain terms that allow the parties to properly apply state and federally tariffed rates, terms and conditions to traffic while ensuring that these terms are not misapplied to IP Enabled Traffic?

(SBC)(a) What is the appropriate form of Intercarrier compensation for ISP-Bound Traffic in accordance with the FCC's ISP Terminating Compensation Plan?

(SBC)(b) Should SBC provide Level 3 with originating carrier number on calls that Level 3 cannot bill through the use of terminating records?

(SBC)(c) For billing purposes, should ISP-Bound Traffic be calculated using the 3:1 Presumption?

a) Parties' Positions and Proposals

(1) Level 3

Much as with IC Issues 19(b) and 20 above, the underlying issue here is the fact that IP-Enabled Traffic is not Circuit Switched traffic and not subject to any access charges. Thus, the Agreement should ensure that the billing arrangements and terms for circuit switched services should not bleed over to IP-Enabled services and traffic. Level 3's language provides for clear segregation of IP-Enabled Traffic from Circuit Switched Traffic for purposes of intercarrier compensation, thus creating a more clear, better defined agreement.

(2) SBC

These issues concern Section 15.2, in which SBC proposes to state that where it "has offered to exchange Section 251(b)(5) Traffic and ISP-Bound traffic pursuant to the FCC's interim ISP terminating compensation plan set forth in the FCC ISP Compensation Order, ISP-Bound Traffic will be calculated using the 3:1 Presumption as set forth in Section 6.6 of this Appendix." This language appropriately implements the ISP Remand Order, and should be adopted. As described above under IC Issues 10 and 13 (which discussion is fully incorporated by reference herein), federal law does not allow Level 3 evade the ISP Remand Order's compensation plan for ISP-bound traffic, once SBC has elected to invoke that plan (which it has in Illinois). Level 3's proposal that the parties agree only to implement future FCC orders, and ignore the ISP Remand Order's compensation plan, violates federal law.

This issue concerns Section 15.1.1, which provides: "Where a terminating Level 3 is not technically capable of billing the originating carrier through the use of terminating records, [SBC] will provide the appropriate originating Category of records including Originating Carrier Number ("OCN")." The language that appears in bold and underline, which has been proposed by Level 3, should be rejected.

OCN is not the proper record from which carriers bill intercarrier traffic; rather, Calling Party Number ("CPN") is used to assign traffic to the appropriate jurisdiction. OCN is not appropriate for that purpose, because it is not part of the actual call transmission. For the purposes of billing compensation to the appropriate party, facility-based CLECs receive the appropriate category of records for calls that terminate to end users served by a CLEC utilizing SBC's unbundled local switching, which will contain the OCN to aid them in billing the proper party. In addition, the CLEC may utilize the Local Exchange Routing Guide ("LERG") and the Local Number Portability ("LNP") Database to help identify the appropriate party to bill.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

Level 3 IC-21. The answer to the general question posed by Level 3 is "yes," since the question addresses terms that are pre-defined by Level 3 as "misapplied." The utility of that self-evident proposition in this arbitration is not apparent to the Commission. To the extent Level 3 is referring to its proposed insertion of the term "Circuit Switched Traffic," we have rejected inclusion of that term in the ICA, for the reasons stated in our resolution of Level 3 Issue ITR-18(d) (which incorporated, in turn, our resolution of Issue DEF-3). To the extent Level 3 is addressing its proposed reference to "Circuit Switched IntraLATA Toll Traffic," the Commission disapproved of that term in our resolution of Issue DEF-3.

SBC IC-21(a). As we stated in our resolution of SBC Issue IC-13(a), SBC's proposed text accurately implements requirements in the ISP Remand Order. Level 3 offers no specific objection to SBC's proposal. SBC's proposal is therefore approved in general, but must be revised, for reasons articulated in connection with Issues DEF-18 and IC-3, by replacing "Section 251(b)(5) Traffic" with either "Telephone Exchange Service Traffic" or "Local Traffic."

SBC IC-21(b). Level 3 provides no specific support for its proposed language, and no response to SBC's critique of that language. Level 3's proposed text is therefore rejected.

SBC IC-21(c). As we stated in our resolution of SBC Issue IC-13(d), SBC's proposed text accurately implements requirements in the ISP Remand Order. Level 3 offers no specific objection to SBC's proposal. SBC's proposal is therefore approved in general, but must be revised, for reasons articulated in connection with Issues DEF-18 and IC-3, by replacing "Section 251(b)(5) Traffic" with either "Telephone Exchange Service Traffic" or "Local Traffic."

22. IC-22 Should the Agreement include SBC's proposed reservation of rights concerning intercarrier compensation ISP-Bound traffic and the FCC's ISP Compensation Order?

a) Parties' Positions and Proposals

(1) Level 3

SBC's proposed Reservation of Rights language proposes section upon section of minutia detailing SBC's view of the world with respect to the impact of the FCC's ISP Remand Order and the related WorldCom decision remanding that proceeding. To be clear, Level 3 is not opposed to including a Reservation of Rights section in the Agreement. Level 3 notes that the agreed upon language in Section 18.1 of the IC Appendix provides for such a Reservation of Rights, and more than adequately protects either parties' interests with respect to the pending FCC ISP Remand proceeding – explicitly noting that "neither carrier waives any rights, and expressly reserves all rights, under the ISP Compensation Order or any other regulatory, legislative or judicial action". In Level 3's view, this simple statement is all that needs to be said.

This is especially true in light of the fact that the FCC is expected at any time to release its order in the ISP Remand proceeding. Level 3 is proposing that the Parties' agree to implement whatever compensation regime the FCC adopts in that order. At that time, if necessary, the Change in Law provisions will kick in and the Parties can negotiate appropriate language to incorporate into the Agreement that will adopt the FCC's findings.

SBC's proposals, however, take the concept to its most extreme. SBC attempts to impose its own interpretations of the legal actions, impose those interpretations on Level 3, and present them to the Commission as a "joint" acknowledgement of the status of the legal landscape. Level 3 cannot, and indeed will not, accept any language that imposes SBC's view of the world on it. For instance, SBC's section 18.2 requires that Level 3 agree to pay and bill Intercarrier Compensation for ISP-Bound Traffic at the rates, terms and conditions specified in Section 6.0 through 6.6 of the IC Appendix. However, IC Appendix Sections 6.0 through 6.6 are sections to which Level 3 has disputed as not consistent with the law and not appropriate in light of the Core Forbearance Order. In other words, SBC is attempting to have Level 3 agree to language which incorporates other sections to the Agreement of which it disagrees.

Rather than burden the agreement with SBC's endless expression of its concerns related to the FCC ISP Remand Order, the more cogent option is to adopt the agreed-upon language in Section 18.1 that reserves the parties' rights, and leave it at that. SBC's language will only lead to confusion and disputes. As such, Level 3 encourages the Commission to adopt its more reasonable approach to the Reservation of Rights language in Intercarrier Compensation Appendix, Section 18.1.

(2) SBC

IC Issue 22 concerns specific reservation of rights and intervening law language proposed by SBC in light of the FCC's pending Unified Intercarrier Compensation NPRM.[254] Given that pending rulemaking and the unique administrative aspects of intercarrier compensation, a special reservation of rights and intervening law provision is appropriate to address forthcoming changes from the FCC.

At the same time that the FCC issued its ISP Remand Order, it also issued a Notice of Proposed Rulemaking ("NPRM") to address intercarrier compensation on a more general basis. The FCC recognized that current market distortions in the intercarrier compensation regime would not be completely addressed within the ISP Remand Order regarding the treatment of ISP Bound Traffic. ISP Remand Order, ¶ 2.

In reality, then, the FCC's *NPRM* is a continuation of the FCC's ISP Remand Order. It will provide long-term guidance as to the treatment of intercarrier traffic in addition to the interim remedies offered in the ISP Remand Order.

Thus, the parties' agreement should contain provisions that expressly acknowledge the FCC's *NPRM*, including language that addresses how the FCC's order resulting from that *NPRM* should be implemented. The FCC clearly acknowledged within the ISP Remand Order that the compensation mechanism contained in that Order was meant to be interim, with more direction to follow as a result of the *NPRM*, and the FCC clearly intends to further review and potentially revise intercarrier compensation.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

The Commission rejects SBC's proposed additions to the parties' agreed language in Section 18. SBC's proposed text in subsections 18.1 and 18.2 is unnecessary, since SBC has already invoked the pertinent rights and options permitted under the FCC's order. SBC's proposed subsection 18.3 is sheer overkill, adding nothing meaningful to the agreed text in subsection 18.1. SBC's proposed subsections 18.4-18.6 would establish a contractual right that may conflict with the requirements of the future FCC and/or judicial orders contemplated in those sections. Most critically, such orders may not include true-up provisions and, if they do, such provisions may not match SBC's proposed contract terms. The Commission concludes that the far superior course is to address future rulings when they actually occur, both through the ICA's change-of-law mechanisms and this Commission's processes.

---

[254] Notice of Proposed Rulemaking, Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, FCC 01-132 (rel. April 27, 2001) ("Unified Intercarrier Compensation NPRM").

F. Recording ("REC")

1. REC-1 Should the ICA provide that when LEVEL 3 is the recording Company, it will provide usage detail according to MECAB standards?

a) Parties' Positions and Proposals

(1) Level 3

SBC proposes that when Level 3 is the Recording Company, Level 3 will provide its recorded billable message detail and access usage record detail data to SBC under the terms and conditions of the Appendix.[255] The terms and conditions of the Appendix require that recorded billable message detail be provided as set forth in the MECAB document, the format historically used for access records exchanged between ILECs and IXCs. However, the MECAB/MECOD format is only a recommendation, not a standard and need not be the exclusive billing and recording language. Level 3 argues that there is no need to artificially limit the billing/recording language to exclusively mandate that the MECAB/MECOB format is the only acceptable format. Level 3 proposes that in light of anticipated reforms to the access charge system,[256] the Parties include language that permits them to discuss mutually agreeable methods for exchanging the same data, but in formats or by means that correspond with the anticipated reforms.[257] The MECAB/MECOD format is a dated format that has been used for decades, and may well be irrelevant after the upcoming reforms to the access charge system.[258] In addition, guidelines for IP calls are still under development and may change the way that the billing for such calls are handled between the companies.

Level 3 does not seek to incorporate a non-industry standard or guideline in the Agreement, but instead seeks the *option* to agree with SBC on another format in anticipation of major changes in the current access charge regime and formatting for IP calls. In other words, Level 3 only asks that the Agreement give the Parties the flexibility to agree to another method of exchanging billing records when such formats become available due to changes in industry guidelines. As such, Level 3's position is reasonable and the Commission should adopt Level 3's language in Recording Appendix Section 3.13.

---

[255] Wilson Direct, p. 37.

[256] The Federal Communications Commission is currently considering issues that will likely affect access charges, such as a number of Voice over Internet Protocol Petitions and the August 16, 2004 Intercarrier Compensation Forum proposal.

[257] Wilson Direct, pp. 37.

[258] Wilson Direct, pp. 37.

(2) SBC

SBC proposes, and Level 3 opposes, the following language for Section 3.13 of the Recording Appendix:

> When LEVEL 3 is the Recording Company, LEVEL 3 will provide its recorded billable messages detail and access usage record detail data to SBC-13 STATE under the terms and conditions of this Appendix.

The "terms and conditions of this Appendix" to which Section 3.13 refers require recorded billable message detail to be provided as set forth in the Multiple Exchange Carrier Access Billing ("MECAB") document. SBC Ex. 14.0 (Smith Direct) at 4. The reason for this requirement is that MECAB is the format that has historically been used and that is used today for access records that are exchanged between ILECs and IXCs. *Id.* Thus, the question presented by this issue is simply whether Level 3 should be required to use the industry standard format. SBC contends it should.

SBC notes that even Level 3 acknowledges that MECAB "is the format used historically for access records that are exchanged between ILECs and IXCs." Level 3 Ex. 4.0 (Wilson Direct) at 37. And indeed, Level 3 is not proposing the use of any particular other format. Instead, Level 3 suggests that in light of anticipated reforms to the access charge system, the parties should "include language that permits them to discuss mutually agreeable ways of exchanging the same data, but in formats or by means that might make more sense once these reforms take effect." *Id*. at 37. What Level 3 means by "language that permits them to discuss" that matter, however, is unclear; Level 3 has proposed no language on this issue. Furthermore, SBC asserts, there is no need for the parties' agreement to include language that permits them to discuss anything. If the parties want to discuss using a different format, they are always free to do so, and if circumstances arise that persuade both parties to agree to use a specific different format, they can so agree. As SBC's witness testified, SBC is always open to reasonable discussion, and, by definition, is always open to a "mutually agreeable alternative." SBC Ex. 14.0 (Smith Direct) at 5. But at least for now, SBC concludes, the interconnection agreement should provide for the parties to use what Level 3 acknowledges is, as of today, the industry standard format.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

The carriers agree that the MECAB format has typically been, and remains, the industry standard for access records exchanged between ILECs and IXCs. The parties also agree that, as an initial arrangement under the ICA, Level 3 will use MECAB to furnish to SBC recorded billable message detail and access usage record detail data. They disagree, however, about Level 3's proposal to include language permitting mutual

discussion and agreement about alternative formats for future use. Level 3 wants such language because it anticipates that the FCC will revise its access charge rules as a result of ongoing proceedings before that agency. Level 3 maintains that by adopting flexibility now, the parties would not have to obtain this Commission's approval for future ICA amendments pertaining to recording. Level 3 Rep. Br. at 92.

The usefulness of Level 3 proposal is limited[259]. SBC emphasizes that discussion and mutual agreement are always permissible, even between parties with an existing and detailed contract. Additionally, new access charge pronouncements by the FCC could unavoidably trigger the ICA's change-of-law provisions, necessitating the Commission review Level 3 seeks to bypass here. Moreover, we are not particularly inclined to assist carriers in avoiding this Commission's scrutiny of contract changes. Although such changes may reflect mutual agreement of the parties, the Commission is still required by the Federal Act to ensure that an agreement is non-discriminatory and in the public interest.

Nevertheless, for the sole purpose of assuring that future revisions are not *precluded*, the Commission directs the parties to include the following sentence, or language accomplishing the same end, in Section 3.13 of the Recording Appendix to their ICA: "However, after the Effective Date of this Agreement, nothing herein shall prevent the parties from determining, by mutual agreement, that Level 3 may utilize another method or format for providing the foregoing detail and data." By this directive, however, the Commission intends no comment on whether any such future change would, or would not, constitute a contract amendment that requires our approval.

2. REC-2 Should the ICA require LEVEL 3 to provide Access Usage Records in accordance with MECAB standards in all instances, or should it provide for the use of alternatives in some circumstances?

a) Parties' Positions and Proposals

(1) Level 3

SBC's language requires the Parties to exchange Access Usage Records according to the guidelines and specifications contained in the MECAB document. However, as discussed in REC Issue-1 above, Level 3 does not believe that the companies should be locked into the historical Access Usage Records ("AUR") format. The AUR format was developed by ILECs and IXCs years ago, and is more appropriate for the huge volumes of circuit-based access traffic generated by IXCs.[260] Level 3 can provide the same information, but prefers to explore simpler formats with SBC. There are currently no guidelines available that address formatting of usage records for IP

[259] Moreover, Level 3 has not supplied any contract language to accomplish its purported intent.

[260] Wilson Direct, p. 39.

calls. Level 3's language in Recording Appendix Section seeks only to leave open the possibility of utilizing a mutually agreeable alternative format when alternatives are available. As such, the Commission should adopt its language in Recording Appendix Section 4.1.

(2) SBC

Like Recording Issue 1, Recording Issue 2 presents the question whether Level 3 will be required to adhere to industry standard formats and protocols for providing usage information. As on Issue 1, SBC maintains that the answer is it should.

Access Usage Records ("AUR") is the industry standard format for providing usage measurement information used to bill IXCs. Further, SBC's witness explained, as part of the industry standard formats, companies use certain protocols that are necessary to ensure that each company's network and systems can correctly read and interpret the usage information. SBC's current method of operating is basic and inherent to the subsystems and infrastructure utilized to support these types of recordings. In other words, SBC has already applied standard procedures to the exchange of data and corresponding records. SBC Ex. 14.0 (Smith Direct) at 7. SBC should not be required to develop new standards or unique processes for Level 3 alone.

Level 3 claims it is asking only "to leave open the possibility of utilizing a mutually agreeable alternative format." Level 3 Ex. 4.0 (Wilson Direct) at 39. That is not, however, what Level 3's proposed language says. And to the extent that Level 3 wants to leave open the possibility of using a mutually agreeable alternative format, there is no need for the contract to say so: By definition, if an alternative format is "mutually agreeable," SBC will agree to it – the parties are always free to mutually agree to depart from what their contract says.

As matters stand today, however, SBC explains that it could not accept a format other than AUR, and it would not be appropriate for the Commission to require SBC to do so. The imposition of a different method, especially one that would apply to only one CLEC, would impose an undue burden and costs on SBC when a proven method currently exists. Id. at 8. Again, though, if circumstances change and another format becomes "mutually agreeable" (Level 3's words), the parties can agree to it, and they do not need contract language to give them permission.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

In contrast to Issue REC-1, Level 3 proposes contract language. However, Level 3's proposed text does not assure that the carriers will use any particular format for exchanging access usage records at the outset of their operations under the new ICA. Rather, in proposed Section 4.1, Level 3 would use AUR "only to the extent [it] has

deployed systems supporting [that format]." Beyond that, the parties would "agree to explore additional options." As a result, neither this arbitration nor the ensuing ICA would definitively identify the format the parties would use when interconnection commences. That uncertainty is not acceptable to the Commission.

Furthermore, SBC maintains that "[a]s matters stand today…[it] could not accept a format other than AUR," SBC Init. Br. at 213, and Level 3 identifies no concrete operational alternative. Therefore, we reject all of Level 3's proposed text for Section 4.1. Nonetheless, for the sole purpose of assuring that future revisions are not *precluded*, we direct (as we did in our resolution of REC-1) that the parties include the following (or text accomplishing the same purpose) at the end of section 4.1: "However, after the Effective Date of this Agreement, nothing herein shall prevent the parties from determining, by mutual agreement, that Level 3 may utilize another method or format for providing the foregoing message detail." By this directive, the Commission intends no comment on whether any such future change would, or would not, constitute a contract amendment that requires our approval.

G. SS7

1. SS7-1 Should the parties compensate each other for SS7quad links for IXC calls at access rates or on a bill and keep basis?

a) Parties' Positions and Proposals

(1) Level 3

Currently, Level 3 uses a third-party provider for SS7 services. However, Level 3 does not want to foreclose its opportunity to build its own SS7 network in order to avoid the additional expenses of using a third party. When Level 3 builds its own SS7 network, it will need to interconnect that network with SBC's SS7 network. The Parties agree that a Bill and Keep arrangement should govern the exchange of SS7 messages for non-toll calls in the event that Level 3 opts to acts as its own SS7 service provider. The disagreement comes as to whether Level 3 can carry all of its SS7 messages, including messages for toll calls, over a single set of Quad Links[261]. SBC's proposal requires Level 3 to establish a duplicate set of Quad Links to carry SS7 messages for toll traffic. Just as with the Interconnection Trunking Facilities issues discussed above, SBC's concerns again relate to preserving their access charges by tracking and billing for access traffic. Level 3 proposes that the Bill and Keep regime apply to each Party's CLEC calls. To the extent that the SS7 Quad Links are used for both local and toll traffic, then the proper access charges owed will be calculated using the same Percent of Local Usage ("PLU") and Percent Interstate Usage (PIU) allocation factors that are calculated to accurately assess access charges when traffic is combined on single trunk

[261] Quad Links are the data connections between SS7 networks that carry the messages necessary for call setup and other functions essential for exchanging traffic.

groups. This makes perfect sense as the SS7 messages correspond to the traffic that is carried on the interconnection trunks.

Requiring Level 3 to build duplicate sets of Quad Links to each SS7 switch wastes scarce resources in both the SBC and Level 3 SS7 networks. There is no technical reason to force Level 3 to construct duplicate sets of Quad Links and then segregate SS7 messages based on the jurisdiction of the traffic that the messages represent. Likewise, there is no technical reason that proper billing for SS7 messages can not be handled using the same PLU and PIU factors developed for efficient billing of the actual call traffic. Level 3's language clarifies that requirement, is consistent with the law and tradition, and the Commission should adopt its language in SS7 Appendix Section 2.1.1.

(2) SBC

The SS7 (signaling system 7) network is a data overlay network that is used for two principal purposes: (i) call set-up and routing, and (ii) accessing call-related databases such as the 800 database, the calling name database, and the database that contains line information for calling card number queries. The SS7 network uses SS7 links, SS7 Signal Transfer Points (which are the SS7 equivalent of switches) and SS7 information databases to perform its functions. It is separate from the Public Switched Telephone Network that actually carries end user voice-grade traffic. SS7 quad links – the subject of this issue – are sets of data links that would be used to connect SBC's SS7 network with Level 3's SS7 network if Level 3 were to deploy an SS7 network.

The parties have agreed that if Level 3 becomes its own SS7 service provider, the parties will exchange SS7 signaling messages on a bill and keep basis, and will also share the cost of the quad links they use to exchange those messages. SBC proposes that in that scenario, the parties will *not* use the quad links for access-type traffic (including long distance Internet Protocol ("LDIP") traffic). Level 3's language, in contrast, would allow the parties to use the quad links for SS7 messaging for access-type traffic, and would require that in that event, the parties would segregate and bill for the messaging for that traffic at access rates.

There are two reasons that the Commission should adopt SBC's language and reject Level 3's. First, the arrangements contemplated by Section 2.1 of the SS7 Appendix, including Section 2.1.1 are, by definition, for the traffic that is within the scope of SBC's obligations under the Telecommunications Act of 1996, not for access traffic. This interconnection agreement under the 1996 Act, in other words, cannot properly be used to impose obligations on SBC concerning access traffic.

SBC has separate and distinct legal obligations regarding what it must make available, and the manner of connection that it is required to provide, to Level 3 as a CLEC versus Level 3 acting as, in essence, an IXC carrying LD IP calls. The interconnection agreement that is the subject of this proceeding pertains to Level 3 as a CLEC, and it governs the interconnection of the parties' networks pursuant to

Section 251 of the 1996 Act. Thus, for example, when the parties say, in the agreed language of Section 2.1, that either party may choose to provide its own SS7 signaling or may purchase SS7 signaling from another party, they are saying that to each other in their capacity as carriers who are interconnecting their networks pursuant to Section 251 – Level 3 as the CLEC and SBC as the ILEC. Similarly, when the parties say, in the agreed language of Section 2.1, that if Level 3 chooses to act as its own SS7 service provider, the parties will exchange traffic on a bill and keep basis and share the cost of quad links, they are saying that to each other in their capacities as CLEC and ILEC. Consistent with that, SBC's language appropriately requires the parties to deal elsewhere with the exchange of SS7 messages associated with traffic that they are not exchanging in that capacity.

The second reason for resolving this issue in favor of SBC is that Level 3's language would require SBC's billing systems to segregate the SS7 messaging of Level 3's CLEC calls from the SS7 messaging of Level 3's long distance IP calls, so that SBC could charge a percentage of the total SS7 messaging costs at the rates that apply to CLEC compensation under this ICA, and charge the remaining percentage of LD IP calls at access rates. But SBC's billing systems cannot do that. When SBC developed its SS7 services, it did not anticipate, and had no reason to anticipate, a need to distinguish and bill for SS7 messaging over the same links that are used for both local and access traffic. As a result, SBC's standard billing procedures for its SS7 signaling services are not equipped to segregate and separately bill for SS7 messaging associated with access traffic. Level 3's proposed language would require SBC to develop and implement new, highly manual billing processes for the "prorated" portion of the calls. Level 3 submitted no testimony on this point, and did not rebut or refute in any way SBC's showing that its billing systems cannot do what Level 3's proposal would require of them.

The Commission sustained precisely the position that SBC is taking here when it rejected an AT&T request to "improperly extend" an ICC decision concerning local SS7 traffic "to include access SS7 traffic." In its decision, the ICC, recognizing that it would not be possible for the parties to segregate and measure SS7 messages for access traffic as opposed to SS7 messages for local traffic if both types were sent over the same link, approved SBC's language that required AT&T to separate the two types of traffic and send them over "different links." As the Commission explained,

> Access traffic is exchanged between SBC and AT&T pursuant to the parties' access tariffs. AT&T purchased the existing D-links and established the existing interconnection arrangements between the parties' SS7 networks in 1992, prior to there being local service competition. AT&T has not entered into an agreement with SBC to exchange local SS7 messages.

> The parties both agree that it is not possible to measure the different types of traffic when it is sent over the same link. [The o]ne possible solution . . . was not advocated by either party. Moreover, it would impact the parties' access arrangements . . . .
>
> SBC's proposed language provides a method by which all traffic can be measured. When AT&T separates local and access traffic onto different links it will be able to accurately bill SBC for access traffic and accurately "bill and keep" SBC for its local traffic. . . .

Accordingly, the Commission adopts SBC's language.

(3) Staff

Staff takes no position on this issue..

b) Analysis and Conclusions

This dispute mirrors the parties' disagreement concerning trunking for voice traffic. Level 3 want to use SS7 quad links for both bill-and-keep and access traffic, with intercarrier compensation calculated with allocators. SBC wants to limit the SS7 quad links to messages subject to bill-and-keep, so that compensation would be based on actual usage rather than allocation.

To be consistent with our conclusions regarding voice traffic, the Commission will approve SBC's proposed Section 2.1.1. The determining factor is not that allocators are flawed instruments - they are certainly sufficient when a superior alternative is not available or practical. Instead, the key point is that allocation is inherently an approximation, which cannot produce the accuracy of direct measurement. Therefore, without a persuasive reason to hold otherwise, we again conclude that accuracy in billing will take precedence over the cost savings and efficiencies that might result from mixed use of the SS7 quad links. In another case, quantification of such savings and efficiencies might tip the balance toward allocation, but the record here has no quantification.

The Commission notes SBC's argument that, based on the FCC's rulings in the TRO, it has no duty to provide SS7 quad links at all,. That is a misleading argument. In the TRO, the FCC held that ILECs did not have to offer SS7 *as a UNE*.[262] The issue presented here, however, is not whether SBC must supply SS7 to Level 3, as a UNE or otherwise. Rather, the instant question presumes that Level 3 will provide its own SS7 services and asks whether mixed or segregated signaling can pass through the carriers'

[262] TRO, ¶544-46.

interconnection points. Thus, the issue here is about interconnection obligations, not UNE obligations.

The meaningful FCC finding in the TRO is that carriers are discovering that fewer signal transfer points ("STPs") are necessary for system reliability[263]. That suggests that Level 3's costs to deploy separate facilities at STPs for access traffic may be less than feared, which, in turn, affects the balance (above) between accurate billing and cost savings. Of course, on our record here, we are not able to quantify that effect.

H. Out of Exchange ("OET")

1. OET-1 Should the applicability of the of the OET Appendix be limited to Level 3's operations solely outside of SBC-13STATE's incumbent local exchange areas?

a) Parties' Positions and Proposals

(1) Level 3

As a threshold matter, Level 3 believes that SBC's language is confusing, unnecessary and duplicative of the terms contained in the ITR and NIM Appendices controlling the manner in which the two networks are interconnected. SBC's real interest in this appendix is its desire to assure that SBC will not be required to provide UNEs or collocation outside of their serving area. Clearly, the Act and FCC regulations to do not obligate SBC to provide UNEs and collocation outside of their serving area, even if SBC were to become a CLEC in such area. There is no need for a separate OET appendix to make this simple issue clear.

The real issue with the OET Appendix is how to handle interconnection of traffic. From a networking perspective, the evidence is clear that traffic to and from CLECs and ICOs will be delivered over the same trunks whether the destination is inside or outside an SBC exchange area when the CLE or ICO switches serve the entire area.[264] Thus, switching systems cannot distinguish OET from non-OET calls, since CLECs and ICOs have customers both within and without the SBC serving area. The evidence also demonstrates that OET traffic should not be treated different than any other traffic interconnecting at established POIs and combined on the same trunk groups with other traffic between the SBC network and the Level 3 network. From Level 3's perspective, this local traffic issue is already subsumed in the NIM and ITR Appendices, and does not require the introduction of another appendix.

SBC's only other issue in the OET section is their desire to assure that SBC will not be required to provide UNEs or collocation outside of their serving area. Clearly, the Act and FCC regulations to do not obligate SBC to provide UNEs and collocation

---

[263] Id., ¶546.

[264] Wilson Direct, p. 47.

outside of their serving area, even if SBC were to become a CLEC in such area. There is no need for a separate OET appendix to make this simple issue clear. Level 3 would have no problem in adding a simple statement to this effect in the General Terms and Conditions section of the agreement.

In short, there is no technical or networking need for separate trunk groups to the SBC tandem switches for OET traffic.[265] SBC's proposals should be rejected in their entirety as unreasonable, and factually unsupported by the record. The Commission should discard SBC's OET Appendix in its entirety as duplicative and confusing.

This OET issue is covered by existing law. However, SBC's language limits the applicability of the terms of the OET Appendix to just those areas governed by the ILEC territory. Level 3 is concerned that, in the event SBC sells off its ILEC operations in a particular service territory or subset of that territory (thus making the area no longer SBC's ILEC territory), Level 3 may be precluded from providing service in that newly disposed territory because Level 3 would not have an ICA with the new ILEC entity.

In the alternative, should the Commission not agree that OET Traffic be excluded from the Agreement, Level 3 proposes that the agreement contain terms defining the OET obligations according to Section 251(h) of the Act, which requiring that OET obligations service sale of an exchange. Specifically, Section 251(h) of the Act defines an ILEC as the local exchange carrier that is a person or entity that, on or after February 6, 1996, became a successor or assign of an ILEC.[266] Under Level 3's proposal, the terms of the OET obligations apply regardless of ownership of an exchange changes. Thus, continuity of service can be assured to Level 3's customers in the affected exchanges.

The Commission should reject SBC's language in OET Appendix Section 2.1. However, in the alternative, Level 3 provides reasonable language to be included should the Commission disagree with the exclusion of OET Traffic.

(2) SBC

With respect to the language in dispute in OET Issue 1, SBC proposes language for section 2.1 of the OET Appendix that it maintains would make clear that the OET Appendix relates to Level 3's operations outside of SBC's "incumbent local exchange areas." Level 3 opposes inclusion of the phrase "incumbent local exchange areas."

Level 3's positions are untenable. While the 1996 Act addresses interconnection between Level 3 and SBC in those areas where SBC is the incumbent local exchange carrier, it does so in Section 251(c). But, those 251(c) obligations are not what the OET Appendix addresses. The OET Appendix, as reflected in the language of section 2.2 agreed to by the parties, relates to interconnection between Level 3 and SBC pursuant

[265] Wilson Direct, p. 48.

[266] Section 251(h)(1)(A)(ii).

to Section 251(a), not Section 251(c), of the Act. SBC Illinois' proposed language simply makes that clear.

For its part, Level 3 offered no testimony specifically addressing section 2.1 of the OET Appendix. Moreover, if Level 3's position were accepted and the phrase "incumbent local exchange areas" were stricken from section 2.1, the remaining language would be vague at best and nonsensical at worst. That is, the sentence would recite that Level 3 intended to operate and provide service "outside of SBC-13STATE" or "outside of SBC Illinois."[267] Whether that, in fact, would mean that same thing as the language that SBC Illinois proposes is unclear to SBC; if it does not, what does it mean? In either case, Level 3's proposed deletion should be rejected.

For these reasons, this Commission should adopt SBC's language for section 2.1 of the OET Appendix.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

Resolution of this issue is subsumed by the Commission's resolution of Issue OET-2.

2. OET-2 (Level 3) Should the OET Appendix expressly limit the obligation of SBC to provide UNEs and access to UNEs to Section 251 of the federal Act, or should it acknowledge other applicable laws that mandate such an obligation?

(SBC) Should the OET Appendix provide that in those areas that are outside SBC's incumbent territory, SBC is not obligated to provide UNEs, Collocation, resale or interconnection pursuant to Section 251 of the Act?

a) Parties' Positions and Proposals

(1) Level 3

This OET issue is covered by existing law. However, in addition to its unbundling obligations imposed pursuant to Section 251 of the Act, SBC also faces unbundling

[267] The parties negotiated across SBC's entire 13-state region and therefore the interconnection agreement is written in such a manner as to be utilized in states other than just Illinois. Thus, it uses terms such as "SBC-13STATE," rather than "SBC Illinois." In the context of this issue being arbitrated in this state, SBC13-STATE means "SBC Illinois."

requirements from a number of other sources. Thus, it is improper to artificially limit the applicable law imposing these obligations, as SBC attempts to do in its language.

For instance, as explained in the arguments related to UNE Issue 1 above, SBC is obligated under Section 271 (and the related 271 orders adopted by the Commission and the FCC) and relevant state laws to unbundled network elements. In particular, the Section 251(c) obligations are referenced and incorporated as obligations of the BOCs under checklist item number two and at least four of the other checklist items require BOCs to provide competitors with "unbundled" access to specific network elements.[268]

In its TRO Order, the FCC held that checklist items four through six and ten constitute a distinct statutory basis for the requirement that BOCs provide competitors with access to certain network elements *that does not hinge on whether those elements are included among those subject to section 251(c)(3)'s unbundling requirements*.[269] Accordingly, as the FCC reiterated in the very recent *SBC Broadband Forbearance Order* "even if [the FCC] concluded that requesting telecommunications carriers are not "impaired" without access to one of those elements under section 251, *section 271 would still require the BOC to provide access*."[270] The USTA II Order affirmed the Commission's conclusions related to the section 271 obligations.[271]

In addition to Section 271 unbundling requirements, SBC is also obligated to unbundled pursuant to state statutes and orders, as well as to collocate pursuant to its tariff and relevant state laws and order. However, SBC's language attempts to dispose of these independent legal obligations by limiting the agreement to referencing just Section 251 of the Act. This is improper, and an affront to this Commission's jurisdiction.

For this reason, the Commission should adopt Level 3's language in OET Appendix Section 2.3 as more consistent with the reality of the law with respect to unbundling obligations.

(2) SBC

OET Issue 2 really goes to the heart of the parties' disagreement relating to the OET Appendix. SBC proposes language for section 2.3 that explains that SBC's obligations under Section 251(c) are set forth in other appendices to the parties' interconnection agreement. It recites that SBC's obligations pursuant to Section 251(c)

---

[268] 47 U.S.C. § 271(c)(2)(B)(ii), (iv), (v), (vi), (x).

[269] *Triennial Review Order*, 18 FCC Rcd at 17382-91, paras. 649-67, *corrected by Triennial Review Errata*, 19 FCC Rcd at 19022, paras. 30-33.

[270] In the matter of SBC Communications Inc's Petition for Forbearance Under 47 U.S.C. § 160(c), FCC Docket No. 04-254, WC Docket No. 03-235, ¶ 7 (rel. October 27, 2004) ("USTA II Order"); citing to Triennial Review Order at 17384, ¶ 653.

[271] *Id*. at 588-90.

are limited to those geographic areas in which SBC is the incumbent local exchange carrier and that SBC does not have Section 251(c) obligations in areas outside of its incumbent local exchange area. This language simply recognizes this fact and makes clear the scope of the parties' OET Appendix.

Level 3 does not dispute SBC understanding of the law. Instead, Level 3 suggests that SBC's proposed language would somehow limit SBC's obligations to provide interconnection. Level 3's concerns are not warranted. The language proposed by SBC does not limit SBC's obligations. It simply clarifies that other appendices in the ICA address the terms and conditions governing Level 3's access to UNEs, collocation, interconnection, and resale as required by Section 251(c)(2), (3), (4) and (6).

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

SBC's primary rationale for a specific OET-related scheme is to make it "clear that the obligations set forth in the OET Appendix are separate and apart from SBC's obligations as an ILEC under Section 251(c)." SBC Init. Br. at 191. That is a valid objective, supported by the language of the Federal Act. Under subsection 251(h), an ILEC is a local exchange carrier "*with respect to an area*"[272] (specifically, the area in which that carrier provided telephone exchange service[273] when the Federal Act was promulgated in 1996). It follows that the duties specifically assigned to ILECs under subsection 251(c) must be limited to the area(s) in which an ILEC is definable as an ILEC, and not in areas in which it is definable, instead, as a CLEC. Level 3 does not disagree. "Clearly, the [Federal] Act and FCC regulations do not obligate SBC to provide UNEs and collocation outside of their [sic] serving area, even if SBC were to become a CLEC in such area." Level 3 Init. Br. at 202. Consequently, the Commission will approve ICA language that appropriately links SBC's duties under subsection 251(c) to SBC's ILEC exchange areas. The first[274] and third[275] sentences in SBC's proposed Section 2.3 will accomplish this objective.

However, except as stated above, the Commission will not approve the language in SBC's OET Appendix for inclusion in the parties' ICA. The traffic that SBC characterizes as "out of exchange" is already adequately governed by other ICA

---

[272] Emphasis added.

[273] In pertinent part, telephone exchange service is "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers interconnecting service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge." 47 USC 153(47).

[274] To be clear, that sentences begins with "Other" and ends with "Services."

[275] That sentence begins with "In addition" and ends with "areas."

provisions. For example, in its proposed GTC Definitions Appendix, SBC identifies "out of exchange traffic" as, *inter alia*, intraLATA traffic to or from a non-SBC ILEC exchange area." But the terms and conditions for exchange of intraLATA traffic are already established elsewhere in the parties' agreement. A call from an SBC exchange to a Level 3 customer in an independent telephone company ("ICO") exchange will be routed to the appropriate Level 3 POI, transported by Level 3 and either delivered by Level 3 to its ISP customer or handed by Level 3 to the pertinent ICO (for termination on the PSTN). The initiating caller will pay retail charges to the originating LEC, and intercarrier compensation will be made pursuant to applicable ICA provisions and tariffs. Traffic from an ICO exchange to SBC's ILEC territory will be similarly managed. Transiting, when involved, will be covered by provisions approved elsewhere in this Decision. None of this requires a separate regime for "out of exchange traffic."

Indeed, much of SBC's proposed OET Appendix either refers to or incorporates parallel terms and conditions found elsewhere in the ICA. Essentially duplicative terms for certain intraLATA traffic are thus unnecessary, particularly when the sole purpose (clarification of its duties under, respectively, subsections 251(a) and 251(c)) is readily accomplished by simpler means (i.e., the SBC language we approve above).

Furthermore, SBC has not demonstrated that its OET proposal is workable. As Level 3 witness Wilson states (and as SBC does not refute):

> For the purposes of billing, traffic is one of three flavors: local, IntraState Toll and InterState Toll. Switching systems certainly can't distinguish OET from non-OET calls, since CLECs and ICOs [independent telephone companies] can have customers both inside and outside an SBC serving area. Traffic to and from CLECs and ICOs will be delivered over the same trunks whether the destination is inside or outside an SBC exchange when the CLEC and ILEC switches serve the entire area.

Level 3 Ex. 2.0 at 47.

Level 3 maintains that SBC's proposed OET Appendix is also "confusing." Level 3 Init. Br. at 201. SBC counters that "it is astonishing that Level 3 would claim the language is confusing, since it is identical to language Level 3 agreed to for the ITR and GTC appendices." SBC Rep. Br. at 102. SBC is correct that the language is identical, but draws the wrong conclusion from that fact. It is the duplication, not the content, of the subject language that sows confusion. Duplication implies that different matters are being addressed, when, as shown above, they are not.

Additionally, the Commission finds it ironic that SBC would present OET issues for arbitration. SBC declares elsewhere in this proceeding that "the negotiation and arbitration provisions in Section 252 apply only to the duties imposed by 251(b) and

251(c), not 251(a)." SBC Init. Br. at 146. In the recent MCI/SBC Arbitration[276], we agreed with SBC that it is subsection 251(a) - the subsection SBC would exclude from this arbitration - that determines SBC's duties outside its ILEC area. Accordingly, SBC's own 251(a) argument would preclude arbitration of OET matters here[277].

We note that we approved an OET appendix in the MCI/SBC Arbitration. In that arbitration, however, we were presented with a single open issue (by MCI), concerning whether SBC should be required to open NXX codes serving exchanges beyond SBC's ILEC territory[278]. In effect, MCI sought to embed in the ICA (but not in an OET appendix) additional obligations for SBC outside of its ILEC territory. In the present arbitration, the parties present a dozen open issues regarding OET, resulting from Level 3's general challenge to the concept of an OET appendix and Level 3's specific objections to several provisions in SBC's particular Appendix. In this procedural posture, the Commission is both obliged and permitted to perform a more comprehensive analysis of OET than we did in the MCI/SBC Arbitration. We view this is a salutary circumstance, because we now find that OET provisions, beyond those we approve from SBC's proposed Section 2.3, are neither necessary nor constructive in an ICA.

3. OET-3 Should language relating to the passing of SS7 signaling information that was agreed to for use in the ITR Appendix also be included in the OET Appendix?

a) Parties' Positions and Proposals

(1) Level 3

The OET language at issue is a duplication of the language contained in ITR Appendix Paragraph 5.4.8, 10.1.1, and 10.3.1. Level 3 does not believe it appropriate in this agreement to limit itself to the specifically listed interface or technology, as SBC would have it do. From Level 3's perspective, the agreement should be flexible enough to allow for adoption of certain other technologies upon agreement of both the parties or applicable law. However, SBC's language in OET Appendix Section 3.1 mandates that Level 3 "shall pass all SS7 signaling information including, without limitation, charge number, and originating line information ("OLI")." SBC's proposal goes on to require CPN, TNS, CIC and CIC/OZZ data when needed. While this may or may not be appropriate based upon the current technology, there is no need to unnecessarily limit the parties' options by adopting language that specifically precludes the consideration of any other format or technology. The Ordering and Billing Forum (OBF) has not yet made recommendations for the content and formats that should be used for IP calls or

---

[276] MCI/SBC Arbitration, Docket 04-0469, Arbitration Decision, November 30, 2004.

[277] We state in connection with Issue ITR-5 that we disagree with that argument.

[278] *Id*.

for traffic that is routed by softswitches. This is one reason that it would be prudent to require some flexibility between the parties. As such, the Commission should reject SBC's language in OET Appendix Section 3.1, and allow for flexibility in light of advanced technology or other mutual agreement between the parties.

(2) SBC

SBC proposes language for section 3.1 of the OET Appendix that addresses the type of SS7 signaling information that Level 3 will provide to SBC. Level 3 opposes this language.

SBC's language should be adopted because it simply reflects what is contained in the Telcordia industry guidelines that describe the SS7 protocol parameters used to determine the jurisdictional nature of calls for the purpose of accurate billing. at 10. The language also reflects Telcordia guidelines for other parameters, including, but not limited to, privacy indicators and parameters that enable SBC to route an end user's call to that end user's chosen long distance carrier.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

Resolution of this issue is subsumed by the Commission's resolution of Issue OET-2.

4. OET-4 (Level 3) Should the OET Appendix include language that trumps the Performance Measures Appendix with respect to the Parties' obligations to ensure acceptable service levels?

(SBC)(a) Should each party be required to administer its network to ensure acceptable service levels to all users of its network services?

(SBC)(b) Should the OET Appendix include terms preserving each party's right to implement protective network management controls and traffic reroutes?

(SBC)(c) Should the OET Appendix include a provision that the parties will cooperate and share information regarding expected temporary increases in call volumes?

a) Parties' Positions and Proposals

(1) Level 3

The contract language at issue in OET 4 is the same or similar to language in ITR sections 3.2, 4.2, 4.4, 4.4.1, 5.2 and its subsections and GT&C 2.12.1 and 2.12.2. As in those sections, the Parties have agreed to the appropriate Performance Measures that should govern service quality under this Agreement, and submitted those terms in this proceeding for approval. In fact, there is not a single dispute between the Parties related to the Performance Measurements Appendix, as it is presented with no requests for any arbitration of its terms. This leaves Level 3 questioning why SBC believes it appropriate to burden the Agreement with additional service quality terms. In addition to the Performance Measurements Appendix, Level 3 notes that certain of the Measurements may also be governed by specific orders of the Commission, as well as FCC regulations, all of which SBC's language ignores. SBC's language amounts to nothing more than an attempt to force Level 3 to waive its rights and benefits under the Performance Measurement Appendix, the FCC regulations and the Commission Orders. As such, Level 3 urges this Commission to reject SBC's language in OET Appendix Section 3.3 and 3.4.

Level 3 does not take issue with the need to maintain the technical integrity of the network. However, Level 3 is concerned over SBC's ability to negatively impact the reliability of the services provided to Level 3's customers over these switched-network rerouting or protective control actions. SBC's language ignores these terms and regulations and, instead, applies such vague terms as "acceptable service levels", "little or no delay", "when required to protect the public switched network from congestion" and "large or focused temporary increases in call volumes". These vague and ambiguous terms can only lead to confusion, disputes and litigation in the future, and seem to be a waiver of the governing terms of the Performance Measurements Appendix.

As stated with OET Issue 4(a) above, Level 3 believes it is appropriate to utilize the terms of the Performance Measurements Appendix and the other FCC and state regulations. Those agreed-upon terms and other regulations provide the clarity and guidance required to address the technical integrity issues that SBC language makes unclear. As such, the Commission should reject SBC's language in OET Appendix Section 3.3, 3.4, 3.5 and 3.6.

The language at issue in this paragraph is the same as language in ITR 10.3.1. SBC proposes language in OET Section 3.6 that mandates that the Parties must cooperate and share pre-planning information regarding cross-network call-ins expected to generate large of focused temporary increases in call volumes. Level 3 acknowledges the obvious need for the two parties to cooperate in the interconnection process. However, the approach SBC suggests is based on language that is far too broad and vague to provide any clarity as to when the terms are activated. SBC presents no attempt to define what level of call-ins qualify as "large and focused", nor what is meant by "sharing pre-planning information". This inherent lack of detail leaves

both Level 3 and SBC open to allegation of abuse and failure to cooperate with the terms of SBC's proposals in OET Appendix Section 3.6 – even when the party has a good faith belief that its actions do not meet the ambiguous terms of that Section. This Commission should reject SBC's proposals in OET Appendix Section 3.6.

(2) SBC

OET Issue 4 pertains to several provisions that SBC proposes to include in the OET Appendix regarding the mutual obligations of Level 3 and SBC. Although Level 3 opposes each of them, it has offered no testimony explaining its position regarding the specific language at issue. And in many instances, Level 3 has agreed to the same language elsewhere in the parties' interconnection agreement. Each provision is reasonable and appropriate and should be adopted by this Commission.

SBC's proposed section 3.3 relates to each party's administration of its network. In particular, SBC proposes the seemingly noncontroversial propositions that "[e]ach party will administer its network to ensure acceptable service levels to all users of its network services," that service levels are considered acceptable when there is "little or no delay" to establish connections, and that the parties will exchange 24-hour contact numbers. SBC administers its network to ensure acceptable service levels to all users of its network services, and expects the same from Level 3 and other carriers. Each carrier should have an obligation to ensure that its network operates at acceptable levels; failure to do so could cause damage to the other party's network or interfere with end user service. Level 3 opposes this language, despite that fact that it agreed to language identical to section 3.3 in GTC section 36.2 and failed to present any testimony specifically addressing this language.

SBC's proposed sections 3.4 and 3.5 relate to protective network management controls and traffic reroutes. The parties have already agreed to language identical to sections 3.4 and 3.5 in ITR sections 10.1.1 and 10.2.1. These provisions are as appropriate in the OET Appendix as they are in the ITR Appendix. The only difference, as explained above, is that the ITR Appendix deals with traffic in areas where SBC is the ILEC, while the OET Appendix deals with traffic outside of SBC's ILEC territory.

Finally, Level 3 opposes SBC's proposed language for section 3.6 of the OET Appendix relating to cooperation between the parties and sharing of information regarding expected temporary increases in call volumes. However, the parties agreed to language identical to section 3.6 in ITR section 10.3.1. While the ITR and OET Appendices are different, the same reasons that this language is appropriate in the ITR Appendix apply to the OET Appendix. Notably, Level 3 does not suggest otherwise.

Accordingly, the Commission should adopt SBC's proposed language for sections 3.3 through 3.6 of the OET Appendix.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

Resolution of this issue is subsumed by the Commission's resolution of Issue OET-2.

5. OET-5 (Level 3)(a) Should Section 4.1 reference Level 3 having a POI within a LATA for within an exchange area?

(Level 3)(b) Should the scope of the OET Appendix govern the exchange of "Telephone Traffic, and ISP-Bound Traffic and IP-Enabled Services Traffic," for "Section 251 (b)(5) Traffic" and ISP-Bound Traffic?

(Level 3)(c) Should the Agreement provide that SBC will accept Level 3's "OET Traffic" or "Telecommunications Traffic"?

(Level 3)(d) Must Level 3 build out Direct End Office Trunks to a third party carrier for transit traffic?

(SBC)(d) Should Level 3 be required to direct end office trunk once traffic between the parties exceed one DSI (or 24 trunks)?

(SBC)(e) Should a non-251/252 service such as Transit Service be negotiated separately?

a) Parties' Positions and Proposals

(1) Level 3

This issue was initially addressed in NIM Issue 2 above (ITR Appendix 4.2), to which the Parties were able to reach an agreement allowing Level 3 to locate a single POI in each LATA. This OET Issue 5(a) should be determined in coordination with the agreement therein.

SBC's language again applies the "Section 251(b)(5) Traffic", which has never been defined in any FCC order or regulation to Level 3's knowledge. SBC's proposed classification of the newly-crafted and amorphous "Section 251(b)(5) Traffic" mischaracterizes the types of traffic that is actually exchanged between SBC and Level 3.

Consistent with the arguments found in ITR Issues 1, and 19. Level 3 proposes that the terms of the agreement characterize the traffic types follow the definitions as set forth in the Act – i.e., "Telephone Traffic, ISP-Bound Traffic and IP-Enabled Services". These terms are easily defined based on existing law and provide clarity as to the scope of the language, thus limiting the opportunity for disputes in the future. As such, the Commission should reject SBC's use of the newly-crafted "Section 251(b)(5) Traffic,

and instead accept Level 3's language in OET Appendix Section 4.1 utilizing clear and defined terms.

SBC asks this Commission to adopt language related to "OET Traffic". Initially, the Commission should recognize that such a term is, before now, an unknown term in the telecommunications industry. In fact, the evidence indicates that Level 3 networking witness Mr. Wilson testified that in his 25 years of experience in the telecommunications industry, he has never heard of the term Out of Exchange, and has never had need to know when traffic is out of exchange traffic.[279] Mr. Wilson also notes that the term is not found in Newton's Telecom Dictionary or in the Telecordia "Notes on the Network", two widely regarded publications in the industry.[280]

From a networking perspective, the evidence is clear that traffic to and from CLECs and ICOs will be delivered over the same trunks whether the destination is inside or outside an SBC exchange area when the CLE or ICO switches serve the entire area.[281] In short, there is no technical or networking need for separate trunk groups to the SBC tandem switches for OET traffic.[282] SBC's proposals should be rejected in their entirety as unreasonable, and factually unsupported by the record.

Section 251(c)(2) mandates that SBC must provide interconnection with Level 3 for the exchange of Telecommunications Traffic, which is precisely what Level 3 proposes to include in OET Appendix Section 4.1. In light of the fact that Level 3's language is not only consistent with, but extracted from Section 251(c)(2), then the Commission should adopt Level 3's language in OET Appendix Section 4.1.

Section 251(a)(1) of the Act requires every telecommunications carrier, including SBC, to interconnect directly or indirectly with every other telecommunications carrier. As explained in the ITR Issues above, Transit Traffic constitutes such indirect interconnection. Further, it is far more efficient use of the network (and the resources of the parties) to utilize the currently existing interconnection facilities between SBC and the numerous RLEC, ILEC and CLEC carriers that operate in the service area. Forcing Level 3 to build out additional interconnection trunks to each carrier to whom traffic may be carried is unwarranted, costly and inefficient. Level 3 also notes that SBC is fully reimbursed for all expenses associated with Transit Traffic, including a reasonable profit. Thus, SBC cannot reasonably claim that using the interconnection facilities for Transit Traffic is a drain on its resources. In light of these facts, and the arguments contained in ITR Issue 1 above, the Commission should adopt Level 3's rationale language in OET Appendix Section 4.1.

---

[279] Wilson Direct, p. 47.

[280] Wilson Direct, p. 47.

[281] Wilson Direct, p. 47.

[282] Wilson Direct, p. 48.

(2) SBC

Each instance of disputed language in section 4.1 of the OET Appendix can be resolved in the same manner as the Commission resolves other disputes between the parties:

- With respect to subpart (a) of OET Issue 5, the Commission should direct the parties to resolve the language in a manner consistent with the parties' resolution of NIM 2.

- With respect to subpart (b) of OET Issue 5, please see the discussion of OET Issue 9 below, as well as discussion of IC Issues 1, 3, 5 and 10a and GT&C Definitions Issues 8 and 18.

- With respect to subpart (c) of OET Issue 5, as argued at length above, the OET Appendix should be limited to "OET Traffic" and not expanded to include "Telecommunications Traffic." Moreover, as discussed in connection with IC Issues 1, 3, 5, and 10a and GT&C Definitions Issues 8 and 18, the Level 3-proposed term "Telecommunications Traffic" is overbroad and vague.

- With respect to subpart (d) of OET Issue 5, please see the discussion of ITR Issue 12. Level 3 and SBC have agreed to establish a direct end office trunk group ("DEOT") once traffic exceeds one DS1 for 3 months. The OET Appendix should similarly provide that Level 3 will establish a DEOT when the amount of OET traffic reaches a certain threshold. DEOTs help conserve tandem switch and trunk resources and make the network more efficient. SBC establishes DEOTs for itself under similar, but more stringent, guidelines, and also requires its affiliates to establish DEOTs at a 24 trunk threshold.

- With respect to subpart (e) of OET Issue 5, see the discussion of ITR Issues 5-9 and IC Issue 11e.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

Resolution of this issue is subsumed by the Commission's resolution of Issue OET-2.

6. OET-6 (Level 3) Should the OET Appendix include an agreement that the Parties will reference the terms and conditions of ITR Appendix between the arbitration and submission of a final agreement to the state Commission?

(SBC) Should Level 3 be required to trunk to each tandem in the LATA?

a) Parties' Positions and Proposals

(1) Level 3

Level 3's language in OET Appendix Section 4.2 that states the Parties agree to reference the interconnection terms and conditions found in the ITR Appendix following arbitration and before submitting a final agreement to the Commission for approval. Level 3's language will provide the Parties with clarity on the duties and roles of the Parties in that interim period. This common-sense approach Level 3 proposes will alleviate any confusion on the appropriate interconnection terms governing. This is especially important in light of the fact that Level 3's current Agreement, which may contain terms different from the terms ultimately adopted in the Commission's deliberations herein, will be replaced with the Agreement stemming from this arbitration.

With respect to SBC's attempt to force Level 3 to build out trunks to each tandem in the LATA, such attempt is directly in conflict with federal law. This matter is detailed above in ITR Issue 1, and Level 3 urges the Commission to adopt terms herein that are consistent with its deliberations in that issue above. As such, the Commission should reject SBC's language and adopt Level 3's language in OET Appendix Section 4.2. Level 3 notes that this issue has been settled in ITR, but the settlement has not yet been translated into a settlement of the mirror OET issue.

(2) SBC

See the discussion of ITR Issue 4(a).

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

Resolution of this issue is subsumed by the Commission's resolution of Issue OET-2.

7. OET-7 Should language relating to trunk groups for ancillary services that was agreed to for use in the ITR Appendix also be included in the OET Appendix?

a) Parties' Positions and Proposals

(1) Level 3

This issue is the same as OET Issue 6 above, and should be decided consistent with the Commission's findings therein. Level 3 urges the Commission to adopt its language in OET Appendix Section 4.3.

(2) SBC

Both Level 3 and SBC agree that language from the ITR Appendix will govern trunk groups for ancillary service. However, only SBC proposes that actual substantive language be included and that language is nearly identical to the language in ITR section 3.2. Level 3 proposes a vague reference to the ITR Appendix, but does not refer to a particular section. SBC's language should be adopted.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

Resolution of this issue is subsumed by the Commission's resolution of Issue OET-2.

8. OET-8 (Level 3)(a) Should the OET Appendix include an agreement that the Parties will reference the terms and conditions of ITR Appendix between the arbitration and submission of a final agreement to the state Commission?

(Level 3)(b) Should the Agreement recognize that SBC will accept Level 3's OET Traffic at switches to which the Parties have established interconnection, or just to SBC's tandem switches?

(SBC)(a) Should SBC b required to double tandem switch calls to/from Level 3?

(SBC)(b) Should SBC End Office(s) provide Level 3 accessibility only to the NXXs that are served by that End Office?

a) Parties' Positions and Proposals

(1) Level 3

This issue is the same as OET Issue 6 above, and should be decided consistent with the Commission's findings therein. The Commission should adopt Level 3's language in OET Appendix Section 4.9.

Under the unambiguous mandates of Section 251(c)(2)(B), SBC must provide Level 3 with interconnection "at any technically feasible point within its network." As detailed in ITR Issue 1 above, Level 3 has the right to choose where and how the interconnection will take place. The ILEC, in turn, must provide the facilities and equipment for interconnection at that point. Level 3's language in OET Appendix Section 4.9 is consistent with these legal requirements. SBC's language, however, again attempts to force Level 3 into interconnecting a trunk group to SBC's tandem or end offices, in violation of the requirements of Section 251(c)(2)(B). For the reasons detailed in ITR Issue 1 above, the Commission should adopt Level 3's language in OET Appendix Section 4.9.

(2) SBC

SBC has proposed substantive language that addresses OET Issue 8. Level 3 has proposed nothing more than a hopelessly vague reference to "relevant terms and conditions from Appendix ITR." The Commission should reject Level 3's language and adopt SBC's.

SBC's proposal provides Level 3 with access to any subtending offices where Level 3 establishes a trunk group to that serving tandem. It is reasonable and appropriate to require Level 3 to establish trunks to each tandem in a multi-tandem LATA. While a POI establishes the point at which SBC and Level 3 facilities meet to interconnect the parties' networks, trunk groups are established on these facilities so traffic can be exchanged between the two networks. Each SBC Illinois tandem serves its own set of end offices and SBC must deliver calls from Level 3 to all of SBC's end users. If Level 3 only establishes a trunk group to the tandem that is near the POI, only those calls to SBC end users that are behind that tandem can be efficiently delivered. Calls destined for SBC end users behind other tandems must be switched at the first tandem to redirect the call to the proper tandem, then switched a second time at the second tandem to the end user's end office for completion, which is not an efficient method of delivering calls from Level 3 to other SBC end users in the LATA. This places an immediate burden on SBC in the form of additional points of switching and additional tandem trunk ports for each call to the distant tandems. And there are long-term effects, also. Redirecting Level 3's traffic from one tandem to another can accelerate tandem exhaust, leading to more frequent tandem switch growth jobs and the need to purchase additional tandems. When Level 3 establishes direct trunk groups to every SBC tandem within the LATA, the network functions more efficiently.

Moreover, trunk capacity at SBC Illinois end office switches is designed for NPA NXX codes that are "homed" at that end office switch; end office switches are not designed to perform a tandem function. SBC engineers each of its end office switches to handle the traffic and switching requirements needed to provide service to only the end users that are connected to each particular office. Calls destined for end users that are in an office other than the office at the terminating end of a direct trunk group should be routed to the proper office. Misrouting calls over a direct trunk group forces an end office to function like a tandem, resulting in network resources for that switch being used at a faster rate than planned. In addition, SBC purchases, administers, and maintains end office switches to function only as end office switches – not as tandem switches. Tandem switches perform functions that cannot be performed by end office switches; forcing an end office switch to function like a tandem reduces the level of service provided to its end users.[283]

Accordingly, the Commission should adopt SBC's proposed language for OET Issue 8.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

Resolution of this issue is subsumed by the Commission's resolution of Issue OET-2.

9. OET-9(Level 3) Should Level 3 and SBC exchange all types of telecommunications Traffic over the interconnection trunks?

(SBC) Should the OET Appendix govern the exchange of "Telecommunications Traffic and IP-Enabled Service Traffic" or "Section 251 (b)(5) Traffic and ISP-Bound Traffic"?

a) Parties' Positions and Proposals

(1) Level 3

This issue is the same as addressed in Level 3 OET Issue 5(b) above. For the same reasons detailed therein, the Commission should adopt Level 3's language in OET Appendix Section 5.1.

[283] See also discussion of ITR Issue 12.

(2) SBC

Although a separate OET Appendix is necessary in order to properly delineate between SBC's obligations in those geographic areas in which it is the incumbent and its obligations in areas outside its incumbent local exchange territory, SBC maintains that the types of traffic at issue are the same under both scenarios. Therefore, for the same reasons set forth in SBC's discussion of IC Issues 1, 3, 5, and 10a and GT&C Definitions Issues 8 and 18, the Commission should adopt SBC's proposal to refer to "Section 251(b)(5) and ISP-Bound Traffic" in OET section 5.1, instead of the vague "Telecommunications Traffic and IP-Enabled Traffic" terminology

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

Resolution of this issue is subsumed by the Commission's resolution of Issue OET-2.

10. OET-10 Should the OET Appendix include terms detailing the compensation due each other for exchanging Transit Traffic?

a) Parties' Positions and Proposals

(1) Level 3

The issues here relate to the use of the interconnection facilities for exchange of Transit Traffic. For the reasons detailed in ITR Issues 1 and 2, Level 3 OET Issue 5(d), Level 3 OET Issue 5(b) and SBC OET Issue 5(e) above, the Commission should adopt the language proffered by Level 3 in OET Appendix Section 6.0, 6.1, 6.2, and 6.3.

(2) SBC

See the discussion of ITR Issues 5-9 and IC Issue 11e.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

Resolution of this issue is subsumed by the Commission's resolution of Issue OET-2.

11. OET-11 (Level 3) Should Level 3 and SBC exchange all types of Telecommunications and IP-Enabled Traffic over the interconnection trunks?

(SBC)(a) Should the OET Appendix govern the exchange of "Telecommunications Traffic and IP-Enabled Services Traffic," or "Section 251 (b) (5) Traffic, and ISP-Bound Traffic?

(SBC)(b) Should SBC be allowed to use a two-way direct final trunk group to exchange traffic with Level 3?

OET-12 Should the Agreement require the Parties to use a two-way direct final trunk groups to exchange traffic with Level 3?[284]

a) Parties' Positions and Proposals

(1) Level 3

This issue also addresses SBC's proposed use of the undefined and nebulous term "Section 251(b)(5) Traffic". As detailed above with regard to Level 3 OET Issue 5(b), Level 3's proposed use of the terms "Telecommunications Traffic and IP-Enabled Traffic" follow the definitions set forth in the Act and FCC orders, and should be adopted in the Agreement. For the same reasons as detailed in OET Issue 5(b) above, the Commission should adopt Level 3's language in OET Appendix Section 9.0, 9.1, 9.3 and 9.7.

SBC's proposes language in OET Appendix Section 9.1 and 9.2 that requires Level 3 to use a two-way direct final trunk group to exchange traffic with SBC and that the associated traffic from each end office will not alternate route. However, SBC's language presupposes that telecommunications and IP-Enabled Traffic will need to alternate route. Level 3 disagrees with the position, thus obviating the need to include SBC's language. As such, the Commission should reject SBC's language in OET Appendix Section 9.1 attempting to impose two-way "direct final" trunks groups.

(2) SBC

See the discussion of OET Issue 11(b) above.

(3) Staff

Staff takes no position on this issue.

[284] OET Issue 12 was inadvertently mislabeled OET ISSUE 11 in the DPL jointly filed by the parties.

b) Analysis and Conclusions

Resolution of this issue is subsumed by the Commission's resolution of Issue OET-2.

I. Physical Collocation ("PC")

1. PC-1 Should this Appendix be the exclusive document governing physical collocation arrangements between Level 3 and SBC, or should Level 3 be permitted to order collocation both from this Appendix and state tariff?

a) Parties' Positions and Proposals

(1) Level 3

Level 3 should not be denied access to sources of Applicable Law and favorable terms in SBC's state and federal tariffs, as SBC proposes, because the Agreement does not specifically list them.

SBC's language states "[t]his Appendix contains the *sole and exclusive* terms and conditions pursuant to which LEVEL 3 will obtain physical collocation from SBC-13STATE."[285] Since the telecommunications industry is constantly evolving, as new developments take place, SBC modifies its retail and wholesale service offerings by changing its state and federal tariffs, including its federal tariffs that offer collocation services (see e.g. SBC Tariff F.C.C. No. 2.). Level 3 should not be precluded from taking advantage of SBC's voluntary offerings that are made available to other companies, or even offerings that are made available through tariffs because of the applicable law.[286]

SBC equates Level 3's language with regard to SBC tariffs with allowing Level 3 to "pick and choose" most favorable collocation rates terms and conditions.[287] In fact, SBC witness Ms. Fuentes-Niziolek goes into a misplaced discussion of the FCC's recent "All-or-Nothing" Rule and how such rule requires a CLEC that adopts another CLEC's interconnection agreement to adopt all the rates, terms and conditions of that agreement.[288] SBC is wrong in its analogy. Importantly, the new "All-or-Nothing" rule relates to adoption of entire interconnection agreements between SBC and another CLEC and has nothing to do with acknowledging the existence of SBC's state and federal tariffs and the impact of modifications that may be made to such tariffs. Should there be a dispute between the Parties as to the impact of modifications of SBC's tariffs

---

[285] See PC Issue 1, Section 4.4 of SBC's proposed PC Appendix.

[286] Mandell Direct, p. 30.

[287] Fuentes-Niziolek Direct, p. 4-5.

[288] Fuentes-Niziolek Direct, pp. 4-5.

on the Agreement, the General Terms and Conditions contain adequate procedures for resolving such disputes.

The Agreement should acknowledge that there may be legislative, administrative or court proceedings (i.e., "Applicable Law" as defined in the Agreement) that will impact the Agreement, including the collocation methods by which the two Parties interconnect, in addition to those specified in the collocation appendices.[289] If the Parties fail to reference "Applicable Law" in the Agreement, it could result in a possible waiver of the Parties' rights pursuant to such legislative, administrative or court proceedings[290]

Level 3's language in Virtual Collocation Appendix Sections 1.2 and 1.10 and Physical Collocation Appendix Sections 4.4, 7.3 and 7.3.3 will allow the Parties to incorporate any methods of collocation captured in such modifications to Applicable Law.[291]

(2) SBC

PC Issue 1 and VC Issue 1 present the same question: should Level 3 be permitted to pick and choose rates, terms and conditions from both its interconnection agreement with SBC and a state tariff, to the extent one is available? The clear answer, is no.

First, the law does not contemplate the availability of tariffs to CLECs under these circumstances. As at least two federal courts of appeal, including the Seventh Circuit, have held, interconnection agreements are the exclusive vehicle through which a CLEC obtains rates, terms, and conditions for interconnecting with an ILEC or obtaining access to an ILEC's UNEs as provided for in Section 251 of the Telecommunications Act of 1996. Wisconsin Bell, Inc. v. Bie, 340 F.3d 441, 442-45 (7th Cir. 2003); Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n, *359 F.3d 493, 497-98 (7th Cir. 2004);* Verizon North, Inc. v. Strand, *367 F.3d 577, 584 (6th Cir. 2004);* Verizon North, Inc. v. Strand, 309 F.3d 935, 940-41 (6th Cir. 2002).

> Second, the FCC has warned that the availability to a CLEC of an alternate set of collocation terms and conditions, apart from its interconnection agreement, would serve as a disincentive to the traditional give-and-take of negotiations.

See Second Report and Order, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, 19 F.C.C. Rcd. 13,494, ¶ 11 (rel. July 13, 2004) (*"*Second Report and Order*"*) (emphasis added). The FCC's reasoning is equally valid here. Just as the FCC concluded that a CLEC

[289] Mandell Direct, p. 29.

[290] Mandell Direct, p. 29.

[291] Mandell Direct, p. 29.

ought not to be able to pick and choose collocation rates, terms, and conditions from another interconnection agreement, a CLEC ought not to be able to pick and choose collocation rates, terms, and conditions from a collocation tariff. Allowing Level 3 to "pick and choose" specific sections (or subsections) of language from a collocation tariff is contrary to the premise of the FCC's Second Report and Order.

Third, Level 3 does not need to order from a tariff in order to obtain access to collocation offerings not made available to it through its interconnection agreement. Through the negotiation and arbitration process, interconnection agreements address all the rates, terms, and conditions pertaining to physical and virtual collocation. Level 3 has had the opportunity to request and/or arbitrate any rates, terms and conditions it felt that it needed in its interconnection agreement. Furthermore, permitting Level 3 to pick and choose from two different sets of rates, terms and conditions would be administratively confusing and burdensome for SBC. There is no compelling reason to allow Level 3 to order out of a tariff, in addition to ordering from its interconnection agreement with SBC, which is the result of arms-length negotiation and arbitration.

(3) Staff

The issues in both PC-1 (Terms and Conditions Governing Physical Collocation) and VC-1 (Terms and Conditions Governing Virtual Collocation) are identical. According to the parties, the issue is whether the relevant Physical Collocation Appendix and Virtual Collocation Appendices should comprise the sole and exclusive terms and conditions governing physical and virtual collocation, respectively; or whether Level 3 should be permitted to order collocation products and services both from the relevant Appendix and from the existing state tariff.[292] In essence, should Level 3 be allowed, "to 'pick and choose' rates, terms and conditions from either its interconnection agreement with SBC, or from a state tariffs"?[293]

The Staff recommends that the Commission adopt SBC's proposals with some modifications to address certain Level 3 concerns. Staff Ex. 2.0 (Omoniyi), at 20. The Staff's recommendation is based on the following two reasons. First, SBC's proposal that "starting on the Effective Date of this Agreement," SBC will honor "any existing Section 251(c)(6) physical collocation arrangements that were provided under tariff prior to the effective date at the prices that apply under this Agreement." Thus, Level 3's concerns regarding its ability to "pick and choose" are overstated; its ability to pick and choose existing rates, terms and conditions is already available and included under SBC's proposed language. Staff Init. Br. at 8.

Second, these parties seem to focus their attention in part on an issue that does not apply to the arbitration of an interconnection agreement. Staff Ex. 2.0 (Omoniyi), at

[292] See Level 3-SBC 13 State –DPL – Physical Collocation, PC-1, at 1-2. and Level 3-SBC State –DPL-Virtual Collocation, VC-1, at 1-2.

[293] SBC Ex. 5.0 at 3.

20. Section 252(i) of the Telecommunications Act of 1996 ("TA 96") appears to apply only to situations where a CLEC wants to adopt an existing interconnection agreement under which another CLEC currently operates, the so-called, "opt-in rule." *Id*. Level 3's proposal does not appear to be an opt-in situation; rather, the issue is whether Level 3 should be allowed to buy from the state tariff after this interconnection agreement has become effective, in spite of the fact that Level 3 has an existing interconnection agreement, the terms and conditions of which govern the purchase of the services it seeks to purchase under the tariff. *Id*. Although SBC termed this as a "pick-and-choose" situation, this is a misnomer. However, it appears the parties do not address a situation where the rates, terms and conditions of this Agreement may be superseded by an SBC tariff. Neither the contract provisions proposed by SBC or Level 3 contemplate this occurrence. Since they do not address this issue, the Staff recommends that SBC and Level 3 should only be permitted to order from an effective SBC tariff if the instant agreement does not address the products or services Level 3 seeks to purchase out of the tariff. *Id*. This should satisfy SBC's concern that the Level 3 proposal could lead to administrative confusion and burden SBC's business. Staff Init. Br. at 8-9.

b) Analysis and Conclusions

The Commission concludes that Level 3 should interconnect with SBC and obtain SBC products and services pursuant to the parties' ICA, not through SBC tariffs. That said, we agree with Staff's recommendation - which SBC purports to adopt - that Level 3 be authorized to obtain services from a tariff when those services are *not* provided through the parties' ICA. Staff Ex. 2.0 at 21. This will permit Level 3 to obtain products, services and terms that were either not addressed or unavailable when the ICA was formed. Additionally, Level 3 should be able to procure products, services and other arrangements from SBC tariffs that, by their terms, are available to a carrier in an ICA with SBC. We also note that when SBC makes new or revised product or service terms (including collocation arrangements) available to CLECs through its Accessible Letters, it "offers each CLEC an opportunity to amend its existing [ICA] in light of changes in law or new, generally available offerings." SBC Init. Br. at 205. We recognize, and intend, that the foregoing options will not afford Level 3 unlimited access to terms and services beyond the ICA. We share the FCC's concern that the give-and-take associated with negotiation will be subverted if carriers can improve upon their compromises, without surrendering their gains, by simply abandoning the former as subsequent opportunities arise[294].

The Commission finds, however, that SBC did not fully incorporate Staff's recommendation in its proposed text[295]. SBC's text would preclude Level 3 from obtaining a non-ICA collocation arrangement from a tariff unless that arrangement

---

[294] Review of the Section 251Unbundling Obligations of [ILECs], CC Docket 01-338, 19 FCC Rcd 13, 494, ¶11 (rel. July 13, 2004), quoted at SBC Init. Br. at 203.

[295] That text appears at SBC Init. Br. at 206, fn. 88.

"would not have been available to Level 3 through this [ICA] had Level 3 exercised its rights under the change of law provisions in this [ICA]." The change of law provisions confer no rights upon Level 3 beyond the right to negotiate and, if unsatisfied, to seek dispute resolution. Therefore, the collocation arrangements that would have been unavailable to Level 3 are not clearly indentifiable. SBC's limit on Level 3's ability to order non-ICA services from SBC tariffs thus dilutes the freedom Staff recommended for Level 3. Accordingly, that unwarranted limitation must be removed from SBC's text.

2. PC-2 Should Level 3 be permitted to collocate equipment that SBC has unilaterally determined is not necessary for interconnection or access to UNEs or does not meet minimum safety standards?

a) Parties' Positions and Proposals

(1) Level 3

SBC proposes language deems it the arbiter of what equipment, if any, Level 3 is able to collocate in its cage. SBC's language gives SBC the authority to prevent Level 3 from collocating equipment "in the event that SBC-13STATE believes that collocated equipment is not necessary for interconnection or access to UNEs or determines that Level 3's equipment does not meet the minimum safety standards". In other words, SBC wants unilateral authority to prevent Level 3 from collocating its equipment.

Rather than making Level 3 subject to the whims of SBC to determine "that the equipment that Level 3 seeks to collocate does not meet the applicable safety standards or is not necessary for interconnection or access to UNEs" as Ms. Fuentes-Niziolek asserts, Level 3 looks to the binding legal guidance presented by the FCC. It is clear upon examination of that FCC guidance that SBC's proposals herein are contrary to the law and sound policy. According to FCC rules, if an ILEC "objects to collocation of equipment by a requesting telecommunications carrier for purposes within the scope of section 251(c)(6) of the Act, *the incumbent LEC shall prove to the state commission that the equipment is not necessary for interconnection or access to unbundled network elements* under the standards set forth in paragraph (b) of this section."[296] As such, the FCC rules make clear that SBC may not *preemptively* deny collocation as asserted in SBC's language and the testimony of its witness. Rather, SBC must prove to the Commission that the equipment is not necessary.

In addition, 47 C.F.R.51.323(c) states, in part, that an ILEC "may not object to the collocation of equipment on the grounds that the equipment does not comply with safety or engineering standards that are more stringent than the safety or engineering standards that the incumbent LEC applies to its own equipment." SBC's language is

[296] 47 U.S.C. §51.323(c).

not only preemptive, but also creates ambiguity with respect to the proper level of safety standards.[297]

In fact, the FCC has rejected the ILEC argument (joined by SBC) "that an incumbent LEC must be allowed to preclude collocation of any equipment that includes one or more functionalities whose deployment is 'unnecessary' for interconnection or access to unbundled network elements."[298] The FCC held that SBC's argument was "unreasonably narrow and disconnected from the statutory purposes."[299]

In spite of this clear and unquestionable FCC precedent, SBC's proposals are inconsistent with the FCC rules, and have been unambiguously rejected by the FCC in the FCC Collocation Order on Remand. On the other hand, Level 3's position strikes a balance between Level 3's right to timely collocate its equipment and SBC's right to require that the equipment collocated in its premises locations meets minimum safety standards.[300]

Such unilateral authority placed in the hands of SBC threatens to impede the very manner in which Level 3 is able to collocate its facilities, especially in light of SBC's proposals to force Level 3 to interconnect at every tandem in the LATA. SBC should not be allowed to preemptively block the placement of Level 3's collocation equipment in SBC's premises locations, until it is determined that the equipment is acceptable for placement in Level 3's collocation space. If SBC is granted unilateral authority to determine what equipment is and is not acceptable for Level 3 to collocate in its collocation space, there is an incentive for SBC to prohibit Level 3 from collocating certain equipment in order to inhibit Level 3 from fulfilling its obligations to its customers.[301]

As such, the Commission should reject SBC's language in Physical Collocation Appendix Section 6.13 and Virtual Collocation Appendix Section 1.10.10, and adopt Level 3's language that tracks the FCC's regulations and orders.

(2) SBC

PC Issue 2 and VC Issue 2 present the same question: in those cases where the parties disagree whether the equipment that Level 3 seeks to collocate is necessary for interconnection or access to UNEs or whether it meets minimum safety standards, should Level 3 be allowed to collocate the equipment, while the dispute is resolved? SBC submits that Level 3 should not be allowed to do so.

---

[297] Level 3 Ex. 5 at 6.

[298] In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Fourth Report and Order, 16 FCC Rcd 15435, ¶41 (Aug. 8, 2001) ("FCC Collocation Order on Remand").

[299] FCC Collocation Order on Remand, ¶ 41.

[300] Level 3 Ex. 5 at 7.

[301] *Id*., at. 5.

Level 3 does not dispute that it may not collocate equipment that does not comply with applicable safety standards or is not necessary for interconnection or access to UNEs. Indeed, Level 3 has repeatedly agreed to provisions in the physical and virtual collocation appendix that make this clear (see, e.g., Physical Collocation Appendix, §§ 4.3, 6.1, 6.11, 8.1, 9.7; Virtual Collocation Appendix, §§ 1.1, 1.10.2, 1.10.8, 1.10.11, 1.12.2, 3.1.) SBC Ex. 16.0 (Fuentes Direct) at 7.

Despite this, Level 3 wants to be able to collocate equipment that SBC Illinois believes is non-compliant, while the dispute over the equipment's compliance is resolved. SBC opposes this because Level 3 would be allowed to collocate a stand-alone switch, so long as Level 3 disputed SBC's conclusion that such equipment could not be collocated. That is plainly unreasonable. The reasonable course is to wait until the dispute resolution process is completed, rather than to permit Level 3 to collocate a piece of equipment that may be illegal.

Level 3's language would also permit Level 3 to collocate a piece of equipment that SBC knows to be dangerous and not in compliance with safety standards. Clearly the law does not mandate this. Permitting such collocation threatens the integrity of SBC's and others' networks and would permit Level 3 to ignore federal law. SBC is ultimately responsible for its network, as well as maintaining and testing it not only for itself, but also for the CLECs that use it. Therefore, it should be SBC in the first instance that determines what may threaten the integrity of its network. Where there is a genuine dispute between the parties about whether a piece of equipment is safe, the prudent course is to not permit it to be collocated until the dispute about its safety can be resolved.

Finally, although Level 3 has suggested that SBC's proposed language is a "departure" from the existing agreement, Level 3 is not able to point to any provision in the parties' current interconnection agreement that addresses the question presented by PC Issue 2 and VC Issue 2. And although Level 3 opposes SBC's proposed language, it has not proposed any alternative language. Therefore, under its preferred course of action for this Commission, the parties' interconnection agreement would remain silent on this issue. That is an unreasonable result, in SBC's view.

For these reasons, the Commission should adopt SBC's proposed language.

(3) Staff

The issue in both PC-2 and VC-2 are identical. According to the parties, the issue is whether Level 3 should be permitted to collocate equipment that SBC has determined is not "necessary for interconnection or access to UNEs" or does not meet minimum safety standards?[302] In this instance, the parties were referring to the term "necessary for interconnection or access to UNEs" as used in Section 251(c)(6).

[302] See Level 3-SBC 13 State –DPL – Physical Collocation, PC-2, at 2-3 and Level 3-SBC State –DPL-Virtual Collocation, VC-2, at 2-3.

The Staff recommends that SBC's proposals be adopted, with some modifications to address certain Level 3 concerns, for the following reasons.[303] Staff Ex. 2.0 (Omoniyi), at 25. First, the issue of placement of collocation equipment requires that the parties take into account the safety of not only the equipment of Level 3 and SBC, but also the safety of the entire network, which includes the equipment of all carriers. It is also a public interest issue as any threat to the network threatens service to all the end users. *Id*., at 26. Accordingly, the Staff finds it reasonable to turn down collocation requests for equipment that fail to meet the minimum safety standards. Staff Init. Br. at 9-10.

Second, a period of ten (10) business days, which SBC proposes, seems to be a reasonable notice period to resolve any issues of equipment collocation. Staff Ex. 2.0 (Omoniyi), at 26. Also, it appears that Level 3 has an additional means of collocation dispute resolution, as it may appeal to the Commission if any discussion between SBC and Level 3 fails to resolve the dispute. See the General Dispute Resolution provisions of General Terms and Conditions, Section 10. Thus, this provision should help eliminate any Level 3 concerns that a dispute could remain in limbo for an extended period of time. Staff Init. Br. at 10.

Third, the proposal by SBC that Level 3 should incur the cost of removal and resulting damages if the non-compliant equipment was already collocated is reasonable as it would be unfair to require SBC to bear the cost of such removal and any resulting damage. Staff Ex. 2.0 (Omoniyi), at 27. Finally, in order to avoid this type of problem in the first place, SBC should make its list of equipment that meets its collocation requirements known to Level 3 as soon as there is a request for collocation of equipment from Level 3. *Id*. This would save both parties time in either avoiding the placement of non-compliant equipment in a collocation cage or resolution of any disagreement prior to collocation of non-compliant equipment by error. *Id.* This step is also in the public interest as it is likely to prevent damages to the entire network that may affect other carriers in the entire network. Staff Init. Br. at 10.

b) Analysis and Conclusions

The Commission believes that this collocation issue presents distinguishable questions of necessity and safety. Safety concerns are more exigent, and involve higher stakes, than disputes about necessity. We will therefore divide this issue into those two categories for analysis and resolution. Additionally, we are mindful of SBC's admonition that this issue addresses the parties' conduct pending dispute resolution, not the substantive standards pertaining to necessity and safety.

[303] The Staff notes that the parties did not address the term of art "necessary" but instead focused on the issue of equipment safety. The Staff's recommendation, consequently, will address the issue of equipment and how that should be the focus of whether a collocation equipment should be allowed or not.

With respect to necessity, the Commission concludes that Level 3 may proceed with new collocation, or continue with existing collocation, while dispute resolution is conducted. The FCC has assigned to ILECs the responsibility of formally proving to this Commission the validity of any claim that collocation equipment is unnecessary[304]. We draw several inferences from this. First, the FCC wants to protect alternative carriers, in every pertinent instance, from arbitrary and anti-competitive action by the subject ILEC. Second, absent a persuasive showing by the ILEC, the relevant collocation equipment must be considered necessary. Third, it would not serve the beneficiary of this regime (the alternative carrier) to be delayed pending the resolution of the formal process required by the FCC for the alternative carrier's protection. That said, this Commission does not want to encourage a "nothing to lose" approach by the CLEC, by which even blatantly unnecessary equipment might be installed with impunity, Consequently, all costs associated with removal of equipment this Commission ultimately finds unnecessary must fall upon Level 3.

Regarding safety, we adopt the opposite resolution. In the face of an SBC objection grounded in safety, new collocation cannot proceed, and collocation already in place must be rendered safe, pending resolution of any formal dispute presented to us. We find it significant that in matters of safety, as contrasted to necessity, the FCC does not require the ILEC to prove its case to this Commission. Instead, the ILEC is obliged only to precisely identify, by affidavit, its safety concern for the CLEC[305]. The CLEC can then either accept the ILEC's sworn claim or initiate dispute resolution or complaint procedures. Thus, the FCC has shifted the burdens of action and persuasion to the CLEC when safety is at issue. In our judgment, it therefore follows that the CLEC cannot continue with the collocation of the pertinent equipment without first alleviating the problem or proving its case.

The Commission does not believe, however, that for collocation *already in place* to be rendered safe, equipment must necessarily be removed from the collocation site during dispute resolution. In addition to identifying the safety requirement that Level 3 purportedly fails to meet (and the manner of that failure), the ILEC must also declare its "basis for concluding why collocation of equipment not meeting this safety requirement would compromise network safety."[306] If that basis can be remedied without removal of equipment (e.g., by disabling it), Level 3 should have the option to do so during the ten-day compliance window contemplated by SBC, but with no option to reactivate the equipment pending any dispute resolution.

---

[304] Whenever an [ILEC] objects to collocation of equipment by a requesting telecommunications carrier for purposes within the scope of section 251(c)(6) of the Act, the [ILEC] shall prove to the state commission that the equipment is not necessary for interconnection or access to [UNEs] under the standards set forth in paragraph (b) of this section." 47 CFR 51.323.

[305] *Id.*

[306] *Id.*

The Commission also adopts Staff's two recommendations for clarifying the parties' rights and responsibilities. First, SBC should provide Level 3 with a list of qualifying equipment upon receipt of a collocation request. Level 3 objects that SBC has committed only to furnishing a list of equipment already collocated with SBC. We cannot, however, require SBC to anticipate any and all equipment that might be collocated, although we suggest that SBC's list include existing or new equipment that SBC believes to be safe, even if such equipment has yet to be collocated at the relevant SBC facility. Second, we agree with Staff that the list should be supplied immediately.

PC-3 Resolved by the parties.

J. Virtual Collocation ("VC")

1. VC-1 Should this Appendix be the exclusive document governing virtual collocation arrangements between Level 3 and SBC, or should Level 3 be permitted to order collocation both from this Appendix and state tariff?

a) Parties' Positions and Proposals

(1) Level 3

Level 3 should not be denied access to sources of Applicable Law and favorable terms in SBC's state and federal tariffs, as SBC proposes, because the Agreement does not specifically list them.

SBC's language states "[t]his Appendix contains the *sole and exclusive* terms and conditions pursuant to which LEVEL 3 will obtain physical collocation from SBC-13STATE."[307] Since the telecommunications industry is constantly evolving, as new developments take place, SBC modifies its retail and wholesale service offerings by changing its state and federal tariffs, including its federal tariffs that offer collocation services (see e.g. SBC Tariff F.C.C. No. 2.). Level 3 should not be precluded from taking advantage of SBC's voluntary offerings that are made available to other companies, or even offerings that are made available through tariffs because of the applicable law.[308]

SBC equates Level 3's language with regard to SBC tariffs with allowing Level 3 to "pick and choose" most favorable collocation rates terms and conditions.[309] In fact, SBC witness Ms. Fuentes-Niziolek goes into a misplaced discussion of the FCC's recent "All-or-Nothing" Rule and how such rule requires a CLEC that adopts another CLEC's interconnection agreement to adopt all the rates, terms and conditions of that

---

[307] See PC Issue 1, Section 4.4 of SBC's proposed PC Appendix.

[308] Mandell Direct, p. 30.

[309] Fuentes-Niziolek Direct, p. 4-5.

agreement.[310] SBC is wrong in its analogy. Importantly, the new "All-or-Nothing" rule relates to adoption of entire interconnection agreements between SBC and another CLEC and has nothing to do with acknowledging the existence of SBC's state and federal tariffs and the impact of modifications that may be made to such tariffs. Should there be a dispute between the Parties as to the impact of modifications of SBC's tariffs on the Agreement, the General Terms and Conditions contain adequate procedures for resolving such disputes.

The Agreement should acknowledge that there may be legislative, administrative or court proceedings (i.e., "Applicable Law" as defined in the Agreement) that will impact the Agreement, including the collocation methods by which the two Parties interconnect, in addition to those specified in the collocation appendices.[311] If the Parties fail to reference "Applicable Law" in the Agreement, it could result in a possible waiver of the Parties' rights pursuant to such legislative, administrative or court proceedings[312]

Level 3's language in Virtual Collocation Appendix Sections 1.2 and 1.10 and Physical Collocation Appendix Sections 4.4, 7.3 and 7.3.3 will allow the Parties to incorporate any methods of collocation captured in such modifications to Applicable Law. [313]

(2) SBC

PC Issue 1 and VC Issue 1 present the same question: should Level 3 be permitted to pick and choose rates, terms and conditions from both its interconnection agreement with SBC and a state tariff, to the extent one is available? The clear answer, is no.

First, the law does not contemplate the availability of tariffs to CLECs under these circumstances. As at least two federal courts of appeal, including the Seventh Circuit, have held, interconnection agreements are the exclusive vehicle through which a CLEC obtains rates, terms, and conditions for interconnecting with an ILEC or obtaining access to an ILEC's UNEs as provided for in Section 251 of the Telecommunications Act of 1996. Wisconsin Bell, Inc. v. Bie, 340 F.3d 441, 442-45 (7th Cir. 2003); Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n, *359 F.3d 493, 497-98 (7th Cir. 2004);* Verizon North, Inc. v. Strand, *367 F.3d 577, 584 (6th Cir. 2004);* Verizon North, Inc. v. Strand, 309 F.3d 935, 940-41 (6th Cir. 2002).

> Second, the FCC has warned that the availability to a CLEC of an alternate set of collocation terms and conditions, apart

[310] Fuentes-Niziolek Direct, pp. 4-5.

[311] Mandell Direct, p. 29.

[312] Mandell Direct, p. 29.

[313] Mandell Direct, p. 29.

> from its interconnection agreement, would serve as a disincentive to the traditional give-and-take of negotiations.

See Second Report and Order, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, 19 F.C.C. Rcd. 13,494, ¶ 11 (rel. July 13, 2004) ("Second Report and Order") (emphasis added). The FCC's reasoning is equally valid here. Just as the FCC concluded that a CLEC ought not to be able to pick and choose collocation rates, terms, and conditions from another interconnection agreement, a CLEC ought not to be able to pick and choose collocation rates, terms, and conditions from a collocation tariff. Allowing Level 3 to "pick and choose" specific sections (or subsections) of language from a collocation tariff is contrary to the premise of the FCC's Second Report and Order.

Third, Level 3 does not need to order from a tariff in order to obtain access to collocation offerings not made available to it through its interconnection agreement. Through the negotiation and arbitration process, interconnection agreements address all the rates, terms, and conditions pertaining to physical and virtual collocation. Level 3 has had the opportunity to request and/or arbitrate any rates, terms and conditions it felt that it needed in its interconnection agreement. Furthermore, permitting Level 3 to pick and choose from two different sets of rates, terms and conditions would be administratively confusing and burdensome for SBC. There is no compelling reason to allow Level 3 to order out of a tariff, in addition to ordering from its interconnection agreement with SBC, which is the result of arms-length negotiation and arbitration.

(3) Staff

The issues in both PC-1 (Terms and Conditions Governing Physical Collocation) and VC-1 (Terms and Conditions Governing Virtual Collocation) are identical. According to the parties, the issue is whether the relevant Physical Collocation Appendix and Virtual Collocation Appendices should comprise the sole and exclusive terms and conditions governing physical and virtual collocation, respectively; or whether Level 3 should be permitted to order collocation products and services both from the relevant Appendix and from the existing state tariff.[314] In essence, should Level 3 be allowed, "to 'pick and choose' rates, terms and conditions from either its interconnection agreement with SBC, or from a state tariffs"?[315]

The Staff recommends that the Commission adopt SBC's proposals with some modifications to address certain Level 3 concerns. Staff Ex. 2.0 (Omoniyi), at 20. The Staff's recommendation is based on the following two reasons. First, SBC's proposal that "starting on the Effective Date of this Agreement," SBC will honor "any existing Section 251(c)(6) physical collocation arrangements that were provided under tariff prior

[314] See Level 3-SBC 13 State –DPL – Physical Collocation, PC-1, at 1-2. and Level 3-SBC State –DPL-Virtual Collocation, VC-1, at 1-2.

[315] SBC Ex. 5.0 at 3.

to the effective date at the prices that apply under this Agreement." Thus, Level 3's concerns regarding its ability to "pick and choose" are overstated; its ability to pick and choose existing rates, terms and conditions is already available and included under SBC's proposed language. Staff Init. Br. at 8.

Second, these parties seem to focus their attention in part on an issue that does not apply to the arbitration of an interconnection agreement. Staff Ex. 2.0 (Omoniyi), at 20. Section 252(i) of the Telecommunications Act of 1996 ("TA 96") appears to apply only to situations where a CLEC wants to adopt an existing interconnection agreement under which another CLEC currently operates, the so-called, "opt-in rule." *Id*. Level 3's proposal does not appear to be an opt-in situation; rather, the issue is whether Level 3 should be allowed to buy from the state tariff after this interconnection agreement has become effective, in spite of the fact that Level 3 has an existing interconnection agreement, the terms and conditions of which govern the purchase of the services it seeks to purchase under the tariff. *Id*. Although SBC termed this as a "pick-and-choose" situation, this is a misnomer. However, it appears the parties do not address a situation where the rates, terms and conditions of this Agreement may be superseded by an SBC tariff. Neither the contract provisions proposed by SBC or Level 3 contemplate this occurrence. Since they do not address this issue, the Staff recommends that SBC and Level 3 should only be permitted to order from an effective SBC tariff if the instant agreement does not address the products or services Level 3 seeks to purchase out of the tariff. *Id*. This should satisfy SBC's concern that the Level 3 proposal could lead to administrative confusion and burden SBC's business. Staff Init. Br. at 8-9.

b) Analysis and Conclusions

The Commission's resolution of Issue PC-1 is fully applicable to this issue as well.

2. VC-2 Should Level 3 be permitted to collocate equipment that SBC has unilaterally determined is not necessary for interconnection or access to UNEs or does not meet minimum safety standards?

a) Parties' Positions and Proposals

(1) Level 3

SBC proposes language deems it the arbiter of what equipment, if any, Level 3 is able to collocate in its cage. SBC's language gives SBC the authority to prevent Level 3 from collocating equipment "in the event that SBC-13STATE believes that collocated equipment is not necessary for interconnection or access to UNEs or determines that Level 3's equipment does not meet the minimum safety standards". In other words, SBC wants unilateral authority to prevent Level 3 from collocating its equipment.

Rather than making Level 3 subject to the whims of SBC to determine "that the equipment that Level 3 seeks to collocate does not meet the applicable safety standards or is not necessary for interconnection or access to UNEs" as Ms. Fuentes-Niziolek asserts, Level 3 looks to the binding legal guidance presented by the FCC. It is clear upon examination of that FCC guidance that SBC's proposals herein are contrary to the law and sound policy. According to FCC rules, if an ILEC "objects to collocation of equipment by a requesting telecommunications carrier for purposes within the scope of section 251(c)(6) of the Act, *the incumbent LEC shall prove to the state commission that the equipment is not necessary for interconnection or access to unbundled network elements* under the standards set forth in paragraph (b) of this section."[316] As such, the FCC rules make clear that SBC may not *preemptively* deny collocation as asserted in SBC's language and the testimony of its witness. Rather, SBC must prove to the Commission that the equipment is not necessary.

In addition, 47 C.F.R.51.323(c) states, in part, that an ILEC "may not object to the collocation of equipment on the grounds that the equipment does not comply with safety or engineering standards that are more stringent than the safety or engineering standards that the incumbent LEC applies to its own equipment." SBC's language is not only preemptive, but also creates ambiguity with respect to the proper level of safety standards.[317]

In fact, the FCC has rejected the ILEC argument (joined by SBC) "that an incumbent LEC must be allowed to preclude collocation of any equipment that includes one or more functionalities whose deployment is 'unnecessary' for interconnection or access to unbundled network elements."[318] The FCC held that SBC's argument was "unreasonably narrow and disconnected from the statutory purposes."[319]

In spite of this clear and unquestionable FCC precedent, SBC's proposals are inconsistent with the FCC rules, and have been unambiguously rejected by the FCC in the FCC Collocation Order on Remand. On the other hand, Level 3's position strikes a balance between Level 3's right to timely collocate its equipment and SBC's right to require that the equipment collocated in its premises locations meets minimum safety standards.[320]

Such unilateral authority placed in the hands of SBC threatens to impede the very manner in which Level 3 is able to collocate its facilities, especially in light of SBC's proposals to force Level 3 to interconnect at every tandem in the LATA. SBC should not be allowed to preemptively block the placement of Level 3's collocation equipment in

---

[316] 47 U.S.C. §51.323(c).

[317] Level 3 Ex. 5.0 at 6.

[318] FCC Collocation Order on Remand at ¶41.

[319] Id.

[320] Level 3 Ex. 5.0 at 7.

SBC's premises locations, until it is determined that the equipment is acceptable for placement in Level 3's collocation space. If SBC is granted unilateral authority to determine what equipment is and is not acceptable for Level 3 to collocate in its collocation space, there is an incentive for SBC to prohibit Level 3 from collocating certain equipment in order to inhibit Level 3 from fulfilling its obligations to its customers.[321]

As such, the Commission should reject SBC's language in Physical Collocation Appendix Section 6.13 and Virtual Collocation Appendix Section 1.10.10, and adopt Level 3's language that tracks the FCC's regulations and orders.

(2) SBC

PC Issue 2 and VC Issue 2 present the same question: in those cases where the parties disagree whether the equipment that Level 3 seeks to collocate is necessary for interconnection or access to UNEs or whether it meets minimum safety standards, should Level 3 be allowed to collocate the equipment, while the dispute is resolved? SBC submits that Level 3 should not be allowed to do so.

Level 3 does not dispute that it may not collocate equipment that does not comply with applicable safety standards or is not necessary for interconnection or access to UNEs. Indeed, Level 3 has repeatedly agreed to provisions in the physical and virtual collocation appendix that make this clear (see, e.g., Physical Collocation Appendix, §§ 4.3, 6.1, 6.11, 8.1, 9.7; Virtual Collocation Appendix, §§ 1.1, 1.10.2, 1.10.8, 1.10.11, 1.12.2, 3.1.) SBC Ex. 16.0 (Fuentes Direct) at 7.

Despite this, Level 3 wants to be able to collocate equipment that SBC Illinois believes is non-compliant, while the dispute over the equipment's compliance is resolved. SBC opposes this because Level 3 would be allowed to collocate a stand-alone switch, so long as Level 3 disputed SBC's conclusion that such equipment could not be collocated. That is plainly unreasonable. The reasonable course is to wait until the dispute resolution process is completed, rather than to permit Level 3 to collocate a piece of equipment that may be illegal.

Level 3's language would also permit Level 3 to collocate a piece of equipment that SBC knows to be dangerous and not in compliance with safety standards. Clearly the law does not mandate this. Permitting such collocation threatens the integrity of SBC's and others' networks and would permit Level 3 to ignore federal law. SBC is ultimately responsible for its network, as well as maintaining and testing it not only for itself, but also for the CLECs that use it. Therefore, it should be SBC in the first instance that determines what may threaten the integrity of its network. Where there is a genuine dispute between the parties about whether a piece of equipment is safe, the prudent course is to not permit it to be collocated until the dispute about its safety can be resolved.

---

[321] *Id*., at 5.

Finally, although Level 3 has suggested that SBC's proposed language is a "departure" from the existing agreement, Level 3 is not able to point to any provision in the parties' current interconnection agreement that addresses the question presented by PC Issue 2 and VC Issue 2. And although Level 3 opposes SBC's proposed language, it has not proposed any alternative language. Therefore, under its preferred course of action for this Commission, the parties' interconnection agreement would remain silent on this issue. That is an unreasonable result, in SBC's view.

For these reasons, the Commission should adopt SBC's proposed language.

(3) Staff

The issue in both PC-2 and VC-2 are identical. According to the parties, the issue is whether Level 3 should be permitted to collocate equipment that SBC has determined is not "necessary for interconnection or access to UNEs" or does not meet minimum safety standards?[322] In this instance, the parties were referring to the term "necessary for interconnection or access to UNEs" as used in Section 251(c)(6).

The Staff recommends that SBC's proposals be adopted, with some modifications to address certain Level 3 concerns, for the following reasons.[323] Staff Ex. 2.0 (Omoniyi), at 25. First, the issue of placement of collocation equipment requires that the parties take into account the safety of not only the equipment of Level 3 and SBC, but also the safety of the entire network, which includes the equipment of all carriers. It is also a public interest issue as any threat to the network threatens service to all the end users. *Id*., at 26. Accordingly, the Staff finds it reasonable to turn down collocation requests for equipment that fail to meet the minimum safety standards. Staff Init. Br. at 9-10.

Second, a period of ten (10) business days, which SBC proposes, seems to be a reasonable notice period to resolve any issues of equipment collocation. Staff Ex. 2.0 (Omoniyi), at 26. Also, it appears that Level 3 has an additional means of collocation dispute resolution, as it may appeal to the Commission if any discussion between SBC and Level 3 fails to resolve the dispute. See the General Dispute Resolution provisions of General Terms and Conditions, Section 10. Thus, this provision should help eliminate any Level 3 concerns that a dispute could remain in limbo for an extended period of time. Staff Init. Br. at 10.

Third, the proposal by SBC that Level 3 should incur the cost of removal and resulting damages if the non-compliant equipment was already collocated is reasonable

---

[322] *See* Level 3-SBC 13 State –DPL – Physical Collocation, PC-2, at 2-3 and Level 3-SBC State –DPL-Virtual Collocation, VC-2, at 2-3.

[323] The Staff notes that the parties did not address the term of art "necessary" but instead focused on the issue of equipment safety. The Staff's recommendation, consequently, will address the issue of equipment and how that should be the focus of whether a collocation equipment should be allowed or not.

as it would be unfair to require SBC to bear the cost of such removal and any resulting damage. Staff Ex. 2.0 (Omoniyi), at 27. Finally, in order to avoid this type of problem in the first place, SBC should make its list of equipment that meets its collocation requirements known to Level 3 as soon as there is a request for collocation of equipment from Level 3. *Id*. This would save both parties time in either avoiding the placement of non-compliant equipment in a collocation cage or resolution of any disagreement prior to collocation of non-compliant equipment by error. *Id.* This step is also in the public interest as it is likely to prevent damages to the entire network that may affect other carriers in the entire network. Staff Init. Br. at 10.

b) Analysis and Conclusions

The Commission's resolution of Issue PC-2 is fully applicable to this issue as well.

K. Unbundled Network Elements ("UNE")

1. UNE-1 (Level 3) Does the FCC's Interim Order maintain the status quo as of June 15, 2004 of the parties' existing interconnection agreement with respect to the availability of UNEs?

(SBC) Which party's UNE proposal most appropriately reflects the current status of federal unbundling law as defined by USTA II, the FCC's TRO? To the extent it is deemed relevant, which party's proposal best effectuates and adheres to the FCC's Interim Order?

a) Parties' Positions and Proposals

(1) Level 3

Level 3 proposes to have the Commission adopt *en toto* the parties' existing terms and conditions for the provision of unbundled network elements. Level 3 basis its position on the recent Interim Order[324], adopted by the FCC. Consistent with the terms of the FCC's Interim Order, the Commission must retain the terms and conditions found in the current ICA between the Parties until the FCC adopts permanent unbundling rules or March 12, 2005, whichever is earlier. According to Level 3, 'BC's terms and conditions for the availability of network elements that are either inconsistent with the applicable law, or are being considered by the FCC. The FCC's Interim Order "froze" the legal status of the availability of network elements until after the FCC reaches a conclusion on its rulemaking proceeding.

---

324 Unbundled Access to Network Elements, Order and Notice of Proposed Rulemaking, WC Docket No. 04-313, FCC 04-179 (rel. August 20, 2004) ("Interim Order").

The Commission should reject SBC's terms and conditions for the availability of network elements.[325] SBC proposes to "declassify" a number of UNEs, claiming that the USTA II Order court vacated several of the FCC's rules that were adopted in the TRO.[326] SBC's contract terms should not be adopted not only because of the Interim Order, but also because SBC's proposed terms mischaracterize the legal status of those UNEs.

The FCC's Interim Order, which took effect on September 13, 2004 requires Incumbent Local Exchange Carriers ("ILECs"), including SBC, to provide access to network elements, including mass market local circuit switching, enterprise market loops (*i.e.*, DS1 and higher capacity loops) *and* dedicated transport under the same rates, terms and conditions that applied under SBC's interconnection agreements and tariffs as of June 15, 2004.[327] Therefore, the Interim Order establishes, on an interim basis, federal requirements that maintain the status quo with respect to the federal unbundling obligations of ILECs as they existed in interconnection agreements and tariffs as of June 15, 2004. As a result, SBC is required under federal law to provide access to the terms and conditions of the parties Interconnection Agreement, as those terms existed on June 15, 2004, until March 13, 2005, which is six months after the Interim Order was published, or until the FCC's permanent federal unbundling rules become effective, whichever date is sooner.

The Interim Order determined that Level 3 and SBC may not arbitrate the terms for accessing unbundled network elements until the FCC adopts permanents rules: "Moreover, if the vacated rules were still in place, competing carriers could expand their contractual rights *by seeking arbitration of new contracts*, or by opting into other carriers' new contracts. *The interim approach adopted here, in contrast, does not enable competing carriers to do either*."[328] According to the FCC, "such litigation would be wasteful in light of the [FCC's] plan to adopt new permanent rules as soon as possible."[329] The FCC recognizes that "[t]he imposition of entirely new interim requirements," such as those that any state commission might impose, "[c]ould lead to further disruption and confusion that would disserve the goals of section 251."[330]

Given the FCC's directive, Level 3 contends that this Commission is prohibited at present from adopting any UNE terms and conditions applicable to switching, enterprise

---

325 Testimony of Michael D. Silver, SBC California at 8, 11 ("Silver Testimony"): SBC Witness Silver claims as follows: "SBC's proposal ensures that Level 3 will continue to have access to the items listed in the Interim Order during the limited period in which Level 3 allegedly is entitled to such access." Silver Testimony at 13.

326 Silver Testimony at 1, 8-10.

327 Interim Order ¶¶ 1, 21, 29.

328 Interim Order ¶ 23 (emphasis added).

329 *Id.*¶ 17.

330 Interim Order ¶ 36.

loops and dedicated transport, beyond that which was in place as of June 15, 2004. Thus, appropriately, Level 3 proposes in this arbitration, consistent with the FCC's Interim Order, continuing the current UNE terms and conditions of the existing ICA between the Parties that were valid and effective as of June 15, 2004. In its Interim Order, the FCC stated:

> . . . we set forth a comprehensive twelve-month plan consisting of two phases to stabilize the market. First, on an interim basis, we require incumbent local exchange carriers (LECs) to continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004. These rates, terms, and conditions shall remain in place until the earlier of the effective date of final unbundling rules promulgated by the Commission or six months after Federal Register publication of this Order, except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations (*e.g.*, an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements.

Of significance, on October 6, 2004, the D.C. Circuit issued an order to *hold in abeyance* until January 4, 2005, a petition for mandamus filed by several ILECs that sought to overturn the interim network unbundling rules established in the Interim Order.[331] Thus, by its refusal to grant the mandamus petition and instead to allow the FCC the time within which to issue its permanent unbundling rules by years' end, it can be readily inferred that the Court found no substantive problems with the FCC's transition scheme, otherwise, presumably, it would have issued a preemptive ruling.

After the FCC adopts rules that will identify the network elements that must be unbundled, SBC may serve an appropriate notice to Level 3 to start the dispute resolution process to amend the Parties' current terms and conditions for all disputed UNEs.[332] If the Parties are unable to agree on the appropriate amendments to the existing agreement, the Parties may engage in dispute resolution, pursuant to the terms of their ICA. To do so is, in the words of the FCC, a "wasteful" exercise,[333] and would only serve to subvert the primary intent of the one-year transitional regime set forth by the FCC in the Interim Order, which is designed to provide a reasonable timeframe for

---

331 United States Telecom Association v. Federal Communications Comm'n, No. 00-1012 (D.C. Cir. Oct. 6, 2004)

332 Level 3 Ex. 1.0 at. 60.

333 *Id.*, at 58 (citing Interim Order ¶ 17).

the FCC to complete its work while interim protections for competitive carriers remain in place.[334]

(2) SBC

Under Section 251(c)(3) of the 1996 Act (47 U.S.C. § 251(c)(3)), incumbent LECs can be required to "unbundle" (i.e., offer at a separate, TELRIC-based price) certain network elements for CLECs. Section 251(c)(3) does not specify what network elements must be unbundled. Rather, the FCC decides what network elements must be unbundled by applying the requirements of Section 251(d)(2) of the Act (known as the "necessary" and "impair" requirements) and the goals of the Act. The terms and conditions on which incumbent LECs provide such unbundled network elements ("UNEs") are established in interconnection agreements.

The FCC has tried three times to establish national unbundling rules. Its first two attempts - in the 1996 Local Competition Order and the 1999 *UNE Remand Order* - were vacated by the courts for misapplying the "impair" requirement of Section 251(d)(2) and imposing overbroad unbundling duties on the incumbents.[335] The FCC's third attempt came in the TRO in August 2003.[336] The TRO attempted to apply more rigorous limitations on unbundling, consistent with the prior court decisions, and the FCC therefore found that many network elements that previously had been required to be unbundled no longer met the 1996 Act's prerequisites for unbundling. These rulings generally applied to specific elements (e.g., OCn-level dedicated transport, entrance facilities, feeder subloops, TRO,¶¶ 253-54, 365-67, 389) or to elements when used for specific purposes (*e.g.,* circuit switching to serve "enterprise market" customers, TRO, ¶ 419). The FCC also required unbundling of some elements and left other unbundling decisions — for high-capacity loops and dedicated transport and for mass-market switching — to state commissions. On appeal of the TRO, the D.C. Circuit upheld the FCC's decisions where unbundling was not required, but reversed and vacated many of the rulings that required unbundling or left unbundling decisions to state commissions. *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, __ U.S. ___ (U.S., Oct. 12, 2004).

The FCC is now in the process of creating new unbundling rules in light of USTA II Order, and has plans to issue those rules by the end of 2004. At present, however,

---

334 *Id.*

335 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15,499 (rel. Aug. 8, 1996) ("Local Competition Order"), reversed and vacated in relevant part by AT&T Corp. v. FCC, 525 U.S. 366, 388-91 (1999); Third Report and Order and Fourth Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 FCC Rcd. 3696 (rel. Nov. 5, 1999) ("UNE Remand Order"), reversed and vacated in relevant part by United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002) ("USTA I").

336 Report and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd. 16,978, corrected by Errata, 18 FCC Rcd. 19,020 (rel. Aug. 21, 2003) ("Triennial Review Order" or "TRO").

the nationally binding law of unbundling is determined by the TRO, to the extent it is still in place, and the D.C. Circuit's vacatur of various requirements of the TRO. The only exception, is one that arose recently in the FCC's Interim Order.[337] The FCC issued the Interim Order as a stop-gap measure while it works on its new unbundling rules. In that order, the FCC required incumbent LECs to continue providing, to the extent required by interconnection agreements as of June 15, 2004, (1) unbundled switching to serve mass-market customers; (2) unbundled enterprise-market loops (DS1, DS3, and dark fiber loops); and (3) unbundled dedicated transport (DS1, DS3, and dark fiber dedicated transport). Interim Order, ¶¶ 1, 21. These requirements will expire when the FCC's new unbundling rules taking effect or on March 13, 2005 (six months from Federal Register publication of the Interim Order), whichever comes first. *Id.* However, the FCC expressly stated that it was *not* reinstating its former unbundling rules, and therefore that these interim requirements are not to be included in any new interconnection agreements. *Id.,* ¶ 23.

Although SBC and Level 3 spent several months negotiating based on SBC's proposed Appendix UNE, Level 3 changed its position after the Interim Order. Relying on that order, Level 3 now asks the Commission to adopt, as part of the new interconnection agreement with SBC, the same Appendix UNE that exists in the parties' prior interconnection agreement, which was approved well before the TRO and USTA II Order. SBC, by contrast, continues to seek approval of its new Appendix UNE, which not only reflects the current state of unbundling law after the TRO and USTA II, but also contains provisions to efficiently and effectively deal with any future changes in unbundling law. Moreover, and even though it had no obligation to do so, SBC has proposed a "rider" to the new agreement that would give Level 3 the full benefit of the Interim Order to the extent it is still in effect when the new agreement is approved.

SBC's proposed appendix should be adopted and Level 3's must be rejected as a matter of law. Simply put, SBC's appendix is the only one that complies with current law and is readily adaptable to any new unbundling rules the FCC may issue. Thus, unless new FCC unbundling rules issue and take effect prior to the arbitration decision here (a scenario discussed further below), the only proper course for the Commission would be to approve SBC's proposed Appendix UNE, for that is the only proposal that reflects the current state of unbundling law after the TRO and USTA II, which is the law that will control until the new FCC rules take effect. SBC's Appendix UNE requires unbundling of network elements to the extent such unbundling is still required under the TRO and after USTA II, but does not require any additional unbundling of elements that are either not required to be unbundled under the TRO or as to which USTA II vacated any rule that required unbundling. Furthermore, SBC's Appendix UNE is well designed to deal with FCC rules that take effect after the contract is approved, as it includes specific processes for declassified UNEs and change-of-law processes for newly required UNEs. *See* SBC Appendix UNE, §§ 2.1-2.5.

---

[337] Order and Notice of Proposed Rulemaking, Unbundled Access to Network Elements, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Aug. 20, 2004) ("Interim Order").

By contrast, Level 3's UNE proposal fails as a matter of law. It is well settled that the purpose of arbitrations under Section 252 of the 1996 Act is to implement the unbundling requirements of Section 251 as reflected in valid FCC rules and orders. 47 U.S.C. §§ 252(c)(1) & (e)(2)(B). Yet Level 3's proposed language would require unbundling of several network elements that are not currently required by any FCC rule or order. At present, for example, there is no valid FCC rule that requires unbundling of enterprise or mass-market circuit switching, any type of dedicated transport, or high-capacity loops (USTA II, 359 F.3d at 565-71, 573-75), yet Level 3's proposed language would require unbundling of all of those elements. *See* Level 3 Appendix UNE, §§ 7, 9, and 10.

Given that its proposed language is inconsistent with unbundling law after the TRO and USTA II, Level 3 resorts to a variety of legal sources outside the TRO and USTA II in hopes of supporting its proposal, but those arguments are invalid. In short, SBC's proposed Appendix UNE is the only legitimate proposal before the Commission and should be adopted in full unless new FCC rules take effect before an arbitration decision or before approval of a final agreement. In either of those cases, SBC's Appendix UNE should be approved except to the extent that it needs to be modified to reflect the FCC's new unbundling rules.

(3) Staff

In the Staff's view, the parties bring this dispute before the Commission in a manner that places the Commission in a difficult position. Staff Init. Br. at 45, *et seq*. The parties' competing proposals would result in numerous different UNE rates, terms, and condition, but the parties do not frame the dispute in terms of such differences. Id. In essence, the parties ask the Commission to make an all or nothing decision. Id.

However, in the Staff's view, determining which proposal is the most appropriate requires the Commission to determine, among other things, which parties resulting UNE rates, terms, and conditions best meet the requirements of Section 251 of the Act. Staff Init. Br. at 45, *et seq*.

Of the two proposals, Staff considers Level 3's the clearer of the two with respect to implementation. Id. Level 3 proposes to incorporate the UNE appendix from the parties existing agreement into the new agreement. Level 3 – SBC 13State – DPL – UNE, Issue No. UNE 1. Level 3 proposes that the parties abide by the rates, terms, and conditions of the existing contract until the FCC releases permanent UNE rules. Id.

However, Staff is compelled to conclude that Level 3's proposal, while easily understood, is inconsistent with the FCC's *Interim UNE Order*. Staff Init. Br. at 45, *et seq*.

The D.C. Circuit Court vacated the FCC's impairment determinations with respect mass market switching, enterprise market loops and dedicated transport. United States Telecom Association v. Federal Communications Commission, 359 F.3d 554, 594-595, 2004 U.S. App. Lexis© 3960. (D.C. Cir. 2004) ("USTA II"). Furthermore, the

FCC has conditioned SBC's requirement to provide certain other UNEs on its requirement to unbundle local switching. Interim UNE Order, ¶4. These elements include CNAM databases and/or information, LIDB databases and/or information, toll free databases and/or information, SS7 systems, shared transport, and Operator Services and Directory Assistance (OS/DA). 47 C.F.R. §51.319(d)(4)(i-ii). The FCC has specified that each of these elements must be made available only when unbundled local switching is made available. TRO, ¶¶534, 544, 549, 551, 560. Therefore, In the Staff's view, the FCC rules do not currently require SBC to provide these elements as Section 251 UNEs. Staff Init. Br. at 45, *et seq*.

Despite the fact that the FCC does not have currently effective rules with respect to these UNEs, SBC is obligated by the FCC's *Interim UNE Order* to provide these UNEs to Level 3 as it did under an effective interconnection agreement or state tariff on June 15, 2004. Staff Init. Br. at 45, *et seq*. That is, the FCC, imposing any specific rules regarding these UNEs, has frozen the rates, terms, and conditions under which they were offered to Level 3 by SBC. Id. The FCC did not, however, freeze the rates, terms, and conditions under which all UNEs must be provided. For example, neither the FCC rules nor the FCC's *Interim UNE Order* currently require SBC to provide UNE enterprise switching. 47 C.F.R. § 51.319(d)(3).

The interim freeze on the parties' contract rates, terms, and conditions is finite in duration. Staff Init. Br. at 45, *et seq*. That is, it terminates: (1) six months from September 13, 2004 (the effective date of the Interim UNE Order), or (2) when the FCC adopts superceding rules, whichever date is earlier. Id. The FCC established directives

for a second sixth month period following the interim freeze, which it has termed a "transition period." Interim UNE Order, ¶29.

The Commission, in another arbitration, ordered SBC to incorporate the terms of this transition period into its contract. XO Arbitration Decision at 95-96. However, subsequent to the Commission's determination, the FCC stated that its "transition period" directives do not constitute final agency action, have no legal force whatsoever, and instead represent a proposal that the agency may or may not adopt when it issues its final rules. *FCC Opposition of Respondents to Petition for Writ of Mandamus*, USTA v. FCC, No. 00-1012(and consolidated cases) (D.C. Cir. 2004), September 16, 2004, at 8, n. 2.

Staff notes that this statement was, perhaps, based in the exigencies of litigation; nonetheless, this Commission ignores it at its peril, and might be well advised to assume there is no currently effective federal Section 251 obligation for SBC to provide the UNEs referenced in the *Interim UNE Order* beyond six months from September 13, 2004. Staff Init. Br. at 45, *et seq*.

Therefore, it is Staff's opinion that Level 3's proposal is inconsistent with the *FCC's Interim UNE Order* in two respects. Staff Init. Br. at 45, *et seq*. First, Level 3 would freeze its existing UNE contract rates, terms, and conditions for all UNEs, rather than the specific subset of UNEs identified for such a freeze by the FCC. Id. Second, it would freeze these rates, terms, and condition indefinitely, rather than for the 6-month period specified by the FCC. Id.

Alternatively, SBC proposes to carry forward selected provisions from the existing contract by way of a "rider" during the 6-month interim period established by the FCC. Level 3 – SBC 13State – DPL – UNE, Issue No. UNE 1. Following this interim period, SBC proposes a replacement UNE appendix that would, among other things, remove certain unbundling requirements. Id. It is not clear to Staff how SBC's proposal could be implemented. Staff Init. Br. at 45, *et seq*.

SBC opposes incorporation of the existing contract rates, terms, and conditions into the new agreement. Level 3 – SBC 13State – DPL – UNE, Issue No. UNE 1. However, SBC's proposed rider requires, by its terms, attachment to the agreement in effect on June 15, 2004. *See* SBC Ex. 8.0 (Silver) Attachment B at 1 ("WHEREAS, as of the date the parties executed the Agreement to which this Temporary Rider is attached, the Interim Order was still in effect, and its interim time period(s) had not yet expired[.]") Furthermore, Staff notes that, even if the rider did not require attachment to an existing agreement, it would not, standing alone, provide for UNEs, such as 2-wire analog loops, that SBC remains required to provide under FCC rules. Staff Init. Br. at 45, *et seq*.

Therefore, Staff takes the view that, while Level 3's proposal might require SBC to provide UNEs that are unaffected by the freeze, and which the FCC rules no longer require SBC to provide, SBC's proposal would relieve SBC from providing UNEs that are unaffected by the freeze and which the FCC rules require SBC to continue

providing. Staff Init. Br. at 45, *et seq*.

SBC further proposes that the Commission require the parties to adopt its proposed Appendix UNE following the expiration of the FCC's interim 6-month freeze period. Staff Init. Br. at 45, *et seq*. SBC's proposed Appendix UNE contains numerous disputed issues that the parties have presumably agreed not to request the Commission to resolve and, more importantly, that SBC has failed to support. *See* Appendix UNE (SBC UNE Appendix).

Thus, it is apparent to Staff that neither party has offered an acceptable proposal to the Commission. Staff Init. Br. at 45, *et seq*. Accordingly, Staff recommends the Commission: order the parties to include within their contract, on an interim basis, the Appendix UNE from the agreement in effect between the parties on June 15, 2004. Id. The Staff further recommends that the Commission further order the parties to append to their agreement the rider proposed by SBC, which comports the previous contract to the terms, and conditions of the FCC's interim freeze. Id.

With respect to the period following the FCC's interim freeze, Staff recommends that the Commission order the parties to jointly develop an Appendix UNE that incorporates existing federal and state rules and regulations as they currently apply to the period following expiration of the FCC's interim freeze period. Staff Init. Br. at 45, *et seq*. The Staff recommends that the Commission require the parties to complete this exercise within 45 calendar days of the adoption of the Commission's arbitration decision in this proceeding. Id. The Staff further recommends that Commission also require the parties, to the extent they cannot agree on rates, terms, and conditions for the Appendix UNE developed for implementation following the FCC's interim freeze period, to present the Commission, again within 45 calendar days, with properly framed issues regarding any disputes for Commission resolution. Id. Staff notes that the 45-day time frame it proposes takes into account the fact that the parties identified numerous disputed issues with respect to their respective proposed Appendix UNEs and ultimately determined to withhold the product of their efforts in this proceeding. Id.

b) Analysis and Conclusions

On December 15, 2004, the FCC issued a press release entitled "FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers." The press release states that the new rules "directly respond" to the USTA II decision that modified the FCC's TRO. Neither a copy of the new rules nor the accompanying FCC order explaining those rules has been made available to the Commission in the instant arbitration. The parties have not analyzed the new rules in briefs, no factual issues have been identified regarding the rules (which, according to the press release, have quantitative thresholds) and no pertinent evidence has been offered. Nor have the parties addressed whether, and how, the new rules would alter their respective proposals in the record here.

In this ambiguous context, the Commission can and will offer only a cautious and very limited resolution of Issue UNE-1. Our intention is to provide enough guidance for the

parties to proceed with interconnection, without rendering any decision on the impact of the FCC's new rules on the provision of UNEs under federal law. We note that Level 3 is not currently obtaining UNEs from SBC[338], so ongoing operations will not be affected by either the new rules or our limited resolution of UNE-1.

Under the federal law we know to have been effective prior to the rules change announced in the press release, SBC was no longer required, under Section 251 of the Federal Act, to unbundle certain network elements addressed in the parties' existing ICA. However, in view of the FCC press release, we cannot, in most instances, identify the elements that will remain free of an unbundling requirement after the new rules are disclosed. The press release states that the overall "unbundling framework" has been altered with respect to the impairment standard, qualifying services, geographic market comparisons and tariffed alternatives. The application of these general changes to specific network elements is, with exceptions, not described in the press release. Consequently, insofar as the TRO, as modified by USTA II, denied (or granted) unbundled access to particular network elements, the new rules may have either reopened (or foreclosed) such access, or made it dependent upon specific circumstances (e.g., conditions in adjacent geographic markets or the nature of tariffed offerings).

To be sure, the press release does announce that unbundled access to certain specific network elements, such as entrance facilities, dark fiber loops and mass market local circuit switching, will not be required. However, with regard to dark fiber loops and mass market local circuit switching, the new rules will include a transition plan, under which unbundled access will be retained for a period of time. Other network elements (e.g., DS-1 transport and DS-3 loops) will also be subject to transition plans, but only after specific factual circumstances have occurred. The press release does not state whether or how such transition plans replace or modify the interim and transition periods in the FCC's Status Quo Order. Therefore, we are unable to determine whether SBC's proposed rider, which purports to implement the interim plans in the Status Quo Order, still reflects applicable law.

In view of the foregoing, we hold that the parties' new ICA should have no UNE provisions other than an acknowledgement that UNEs must be offered as required by law, and that the parties will negotiate ICA terms and conditions for UNEs within a reasonable time period after public dissemination of the FCC's Order on Remand in FCC Docket 04-290 and the accompanying rules announced in the press release.

[338] Tr._.

L. Coordinated Hot Cuts ("CHC")

1. CHC-1 Whether the prices for Coordinated Hot Cuts should be based on forward looking economic costs approved by the Commission?

a) Parties' Positions and Proposals

(1) Level 3

A coordinated hot cut ("CHC") is used when a CLEC needs to cut a customer to another loop within a very specific timeframe. A CHC varies from a batch hot cut in that the cut occurs at a specific time on a specific day to minimize the time that a customer might be out of service.[339]

Level 3 believes that CHC services should be priced at Commission-approved TELRIC rates. In contrast, SBC proposed that the Commission adopt a nebulous, quasi-formula that results in inconsistent charges varying by day, carrier and lines, instead of merely adopting the prices ultimately approved by the Commission.[340]

In the Joint DPL submitted to this Commission in August 2004, SBC claims that its costs of performing a hot cut are "covered by TELRIC-based rates as required for the provision of UNE elements."[341] However, SBC claims that it "allows CLECs to request that SBC provide optional coordination of the hot cut activity" that is not part of the actual provisioning of the CHC UNE. To SBC, rates for this "optional" service are based on a time sensitive basis.[342] But from SBC's language in Section 3 and the corresponding rate sheets, SBC's rationale for its rates is unclear. It appears that SBC's rates for the "optional" service are *not* forward-looking, or TELRIC-based, but instead are based on several time-sensitive variables. As such, Level 3 cannot fully assess SBC's proposal and corresponding rates, especially since SBC did not provide any justification for those rates. From SBC's statements in the Joint DPL, SBC's rate proposal does not comply with the FCC's TELRIC standard.[343]

The Commission should hold SBC to a strict interpretation of the FCC's TELRIC rules in setting coordinated hot cut rates. The Commission must ensure that SBC's underlying TELRIC costs, and its resultant rates, comply with the FCC's forward looking, most efficient technology standards. In doing so, the Commission should ignore the significant amounts of manual intervention typically inherent in SBC's processes, for which SBC will undoubtedly claim it must recover its costs. Instead, the

---

[339] Level 3 Ex. 3.0 at 66.

[340] *Id*., at 67.

[341] See, SBC Position/Support section of the CHC DPL submitted in August, 2004.

[342] Level 3 Ex. 3.0 at 66.

[343] *Id*.

Commission must set rates based on efficient systems and processes built around existing technologies capable of providing a more efficient, least cost hot cut process.[344]

Level 3's position is far more reasonable and straightforward – that SBC's CHC service must be based upon its forward-looking, TELRIC-based rates. Therefore, the Commission should adopt Level 3's language and reject SBC's language in Section 3.1, 3.2, 3.2.1, 3.2.2, 3.2.3, 3.2.4 and 3.2.5 of the CHC Appendix.

(2) SBC

The question presented by this issue is whether the prices Level 3 will pay SBC for optional coordination of hot cuts will be TELRIC prices, as Level 3 proposes, or non-TELRIC, tariffed prices, as SBC proposes. Level 3's contention that SBC should be required to perform hot cut coordination work at TELRIC-based rates is contrary to law, for the simple reason that hot cut coordination is optional – it is not something that the 1996 Act requires SBC to do. It is axiomatic that the only things an incumbent LEC can lawfully be required to do at the cost-based rates prescribed by Section 252(d) of the 1996 Act are those things that the 1996 Act requires the ILEC to do in the first place (or authorizes the State commission to require the ILEC to do). As a legal matter, the mandatory pricing standards of the 1996 Act plainly apply only to those activities that are within the purview of the requirements of the 1996 Act. And as a matter of basic common sense, if an ILEC cannot be required to perform a particular service at all, it cannot be required to perform that service at a particular price.

A coordinated hot cut is an optional service that requires SBC to expend additional labor. SBC developed the coordinated process to accommodate CLECs, and devotes substantial technician time to perform the work, but nothing in the 1996 Act requires SBC to perform coordinated hot cuts, or authorizes State commissions to require SBC to perform coordinated hot cuts. Level 3 apparently agrees. Not only has Level 3 not disputed that proposition in this proceeding, but Level 3 agreed to the following language for Section 2.1 of the CHC Appendix:

> 2.1 Coordinated Hot Cut (CHC) Service is an *optional* manual service offering that permits LEVEL 3 to request a designated installation or conversion of service occurring at a specific time of day as specified by LEVEL 3 during, or after, normal business hours. (Emphasis added.)

Given that the coordination is optional, it necessarily follows, as explained above, that SBC may charge Level 3 its tariffed rate for it, and cannot lawfully be required to limit its charges to the cost-based rates that pertain to services that SBC is required to provide under the 1996 Act.

[344] Level 3 Ex. 3.0 at 67.

(3) Staff

Staff takes no position on this issue.

b) Analysis and Conclusions

SBC demonstrates that coordination of hot cuts is an optional and premium service, that its associated labor costs are not recovered through the TELRIC rates applicable to the underlying loop, and that no part of the loop cost is recovered through the hot cut coordination fee. Given these facts, the text of the Federal Act furnishes no basis for TELRIC pricing, and Level 3 provides no other factual or legal rationale for requiring such pricing for coordinated hot cuts. It follows that we approve SBC's proposed resolution of this issue.

IV. ARBITRATION STANDARDS

Under subsection 252(c) of the Federal Act, the Commission is required to resolve open issues, and impose conditions upon the parties, in a manner that comports with three standards. The Commission holds that the analysis in this arbitration decision satisfies that requirement.

First, subsection 252(c)(1) directs the state commissions to "ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." In this arbitration, the Commission has directed the parties to include provisions in their interconnection agreement that fully comport with Section 251 requirements and FCC regulations.

Second, subsection 252(c)(2) requires that we "establish any rates for interconnection, services or network elements according to subsection [252(d)]." Here, most of the pertinent rates were already established by the parties through mutual agreement. Insofar as the Commission's resolution of open issues will affect those or other rates in the parties' interconnection agreement, we require, and expect the parties to establish, rates that are in accord with subsection 252(d) of the Federal Act.

Third, pursuant to subsection 252(c)(3), the Commission must "provide a schedule for implementation of the terms and conditions by the parties to the agreement." Therefore, the Commission directs that the parties file, within 15 calendar days of the date of service of this arbitration decision, their complete interconnection agreement for Commission approval pursuant to subsection 252(e) of the Federal Act.

DATED: December 23, 2004
BRIEFS ON EXCEPTIONS DUE: January 7, 2005
REPLY BRIEFS ON EXCEPTIONS DUE: January 14, 2005

David Gilbert
Administrative Law Judge